Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5671

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioner

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement of the Case	
A. General Background	3
B. Facts Material to the Question Presented	4
C. Manner in Which the Federal Question was Raised	8
Reasons for Granting the Writ	9
Conclusion	15
Figure 1, 1890 J.M. Clapp Survey (Ex 62 and 153)	18
Figure 2, 1853 Hyde Survey (Ex 59 and 153)	19
Figure 3, U.S. Geological Survey Map 1911-1913 (Ex 257)	20
Appendix A: Opinion of Oregon Supreme Court	23
Appendix B: Opinion of Oregon Supreme Court denying rehearing	28
Appendix C: Denial of Motion to Withdraw Clarifying Opinion of Oregon Supreme Court	30
Appendix D: Judgment of Oregon Supreme Court	31
Appendix E: Acceptance of Review by Oregon Supreme Court	33
Appendix F: Opinion of Oregon Court of Appeals	34
Appendix G: Memorandum Opinion of Trial Court	71
Appendix H: Findings of Fact of Trial Court	80
Appendix I: Judgment of Trial Court	94
Appendix J: Exhibit 110-A	99
Appendix K: Testimony of Fred Fischer	103

SUBJECT INDEX—Continued

Cases Cited

	Page
Arkansas v. Tennessee, 246 US 158, 173 (1918)	16
Bonelli Cattle Co. v. Arizona, 414 US 313 (1973)	3, 11, 13, 14, 15
Commissioners v. United States, 270 F 110 (8th Cir 1920)	11, 12, 13, 15
Denny v. Cotton, 3 Tex Civ App 634, 22 SW 122 (1893)	17
Hancock v. Moore, 135 Tex 619, 146 SW 2d 369 (1941)	16
Jefferis v. East Omaha Land Co., 134 US 178 (1890)	16, 17
Nebraska v. Iowa, 143 US 359 (1892)	16, 17
Oklahoma v. Texas, 260 US 606 (1923)	17
Pannell v. Earls, 252 Ark 385, 483 SW 2d 440 (1972)	17
Philadelphia Co. v. Stimson, 223 US 605 (1912)	16
State v. McVey, 168 Or 337, 121 P2d 461 (1942)	3
State ex rel v. Warden, 200 Okla 613, 198 P2d 402 (1948)	16
United States v. Oregon, 295 US 1 (1935)	3
Wood v. McAlpine, 85 Kan 657, 118 P 1060 (1911)	16

Statutory Provisions

11 Stat 383	3
28 USC §1257 (3)	2

Miscellaneous Text

US Army Corps of Engineers, Flood Plain Information, Corvallis and Philomath, Oregon (March 1971)	8

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner State of Oregon, acting by and through its State Land Board, prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Oregon entered in this proceeding on June 12, 1975.

OPINIONS BELOW

The trial court's memorandum opinion is reprinted in Appendix G.

The opinion of the Court of Appeals of the State of Oregon affirming in part and reversing in part the judg-

ment of the trial court is reported at 99 Adv Sh 1532, 18 Or App 524, 526 P2d 469 (1974) and reprinted as Appendix F hereto.

The opinion of the Supreme Court of the State of Oregon affirming the judgment of the Court of Appeals as modified is reported at 75 Adv Sh 2068, — Or ——, 536 P2d 517 (1975) and reprinted as Appendix A hereto.

A second opinion of the Oregon Supreme Court is reported at 75 Adv Sh 2562, —Or ——, 538 P2d 70 (1975) and reprinted as Appendix B hereto.

JURISDICTION

On June 12, 1975, the Supreme Court of Oregon entered its judgment affirming the judgment of the Court of Appeals as modified.

On July 17, 1975, the Supreme Court of Oregon in a clarifying opinion denied timely petitions for rehearing filed by both parties.

On August 6, 1975, in response to a timely motion of the defendant, the Supreme Court of Oregon "denied respondent's [defendant's] motion to withdraw, or suspend clarification of opinion with regard to the above entitled case." (Appendix C). This petition for a writ of certiorari was filed within 90 days of that date pursuant to rule 22(3) and the provisions of 28 USC § 1257(3) under which the jurisdiction of this Court is invoked.

QUESTION PRESENTED

In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding "suddenly" becomes the main channel, and the other channel eventually becomes unusable, does federal law deprive the public of title to the beds of both channels?

STATUTE INVOLVED

11 Stat 383 provides that:

"That Oregon be, and she is hereby, received into the Union on an Equal footing with the other States in all respects whatever, with the following boundaries: . . ."

STATEMENT OF THE CASE

A. General Background

The Willamette River is a navigable river within the state of Oregon. In 1859, Oregon was admitted into the Union "on an [e]qual footing with the other states in all respects whatever". 11 Stat 383. Under the equal footing doctrine title to lands beneath navigable waters passed from the Federal Government to the new states upon their admission to the Union. *Bonelli Cattle Co. v. Arizona,* 414 US 313, 318 (1973). Oregon thus acquired at statehood title to the beds of all rivers then navigable within its boundaries. *United States v. Oregon,* 295 US 1, 14 (1935); *State v. McVey,* 168 Or 337, 345, 121 P2d 461 (1942).

This case arises because the state brought ejectment to recover possession from defendant of various parcels comprising the present riverbed including parcels comprising "Fischer Cut" to which the state claimed ownership by virtue of its sovereignty. Fischer Cut is now the main channel of the river but prior to 1910 was a subsidiary channel across the neck of Fischer Island. *See* figure 1 at 18.

With exceptions not here material, the trial court ruled in favor of the state on all the parcels claimed except for parcels 2A, 2B and 2C and a portion of parcel 3 which the trial court held were part of Fischer Cut and avulsive and, therefore, belonged to the defendant (Appendix G).

Both parties appealed. The Oregon Court of Appeals affirmed. On review, the Oregon Supreme Court affirmed the Court of Appeals on the issue of avulsion but modified that court's holding as to the length of the avulsion and as to damages (Appendix A).

B. Facts Material to the Question Presented.

1. Characteristics of the River.

The Willamette River is a typical navigable river subject to numerous changes in course (Tr 1044-1045). Contributing to its instability were banks of a "loose sandy soil or gravel" which were "constantly caving and precipitating trees into the river" (Ex 112-A at 5) with

the result that natural wingdams formed, new islands and channels were constantly being created and "channel changes occurred at some locations year to year" (Ex 94-A at 3-5, Ex 114 at 907, Ex 115 at 655; Tr 521-522). Frequent changes of course also occurred in the Corvallis area which was a typical reach of the river (Ex 94-A at 3-5; Tr 779). A factor in this process was recurrent winter flooding (Ex 114-C at 2848) with extraordinary floods occurring in 1861, 1890, 1893, 1894, 1901, 1903, 1907 and 1909 (Ex 71 at 8-9, 162, 174, 202, 203; Ex 94-A at 7, 9; Tr 434). In the Corvallis area banks under 20 feet were covered by high water whereas during extreme high water the whole valley was overflowed (Ex 94-A at 2, Ex 112-A at 5; Ex 114-C at 2848; Tr 394, 396, 1032-1035).

2. Formation of Fischer Cut.

In 1853 and thereafter, the Willamette River at Corvallis coursed around a peninsula-like formation, or oxbow, which later became Fischer Island (Ex 59, Hyde Survey of 1853). *See* figure 2 at 19. Exhibit 59 itself shows evidence of minor erosive channels or gullies near the neck of the oxbow.

By 1890 an overflow channel about 3200 feet in length had formed at the neck of the peninsula (Ex 62). *See* figure 1 at 18. Water commenced to run in this channel at the five-foot stage (Ex 114-C at 2849; Tr 225). It was

noted in an early official report in 1890 that if the overflow channel "were cleaned of the driftwood and willow growth, so as to give *the high water a free channel, I think that the water would enlarge it very much and probably change the course of the river of its own accord as it is a direct chute and the material of a sandy nature.*" (Ex 98-A at 2) (emphasis supplied).

This report was followed by another in 1892 which noted that at Corvallis the valley bottom consisted of three channels for low water discharge and also "sloughs, high water channels and old riverbeds, that serve as outlets for the water at medium and ordinary high water stages." (Ex 114-C at 2848; Tr 299-300). The report noted the sandy nature of the chute, its natural enlargeability by the river if it were cleared of debris and that "in time the low water flow of the river may take this course." (Ex 114-C at 2849; Tr 304).

The effect of the floods of 1893, 1894, 1901 and 1903 and normal winter flooding was to deepen and enlarge the overflow channel so that by 1906 an estimated one-fourth of the river was flowing through this channel at only the four-foot stage (Ex 110-A, Appendix J; Tr 225). Also, the banks of the overflow channel were "caving" eastward (to the right) toward Fischer Island away from the firm left bank, the "Seavy" side. (Ex 110-A at 2; Appendix J; Tr 387, 390, 404, 514, 702-703).

Fischer Island and Fischer Cut were owned by the Fischer family (Tr 398, 399). Fred Fischer, their son, testified no one cleared the overflow channel of the trees and debris—natural winter flooding did this (Tr 404). Fischer testified:

"Q. I see. *Did this gully enlarge during the years?*

"A. *O, yes, it kept going in all the time now.*

"Q. When you say kept going in—

"A. Going, going east.

"Q. *You mean moving toward Fischer Island?*

"A. *Yes, taking soil away from us.*

"Q. I see.

"A. Probably as much as, oh, that area, *I should judge we lost through that Fischer Cut probably 60 acres.*

"Q. You mean the water eroded this away?

"A. *Yeah, in time, oh a period of five years anyway.*

"Q. I see.

"A. *Before it broke through* and it kept gradually—gradually—and finally the steam boat used to go around here." Tr 394-395 (Appendix K at 107, *see also* Tr 403 (Appendix K at 113-114) (emphasis supplied)[1]

Following the major floods of February 1907 and

[1] The Oregon Supreme Court interpreted Fischer's testimony (Appendix K) as failing "to explain whether the erosion he referred to occurred before or after the 1909 flood" 536 P2d at 519. The testimony and exhibits referred to above render this interpretation incorrect, particularly because the major erosive floods occurred prior to 1910 without another major flood until 1923. *See* US Army Corps of Engineers, Flood Plain Information, Corvallis and Philomath, Oregon at 2 (March 1971). *See* Tr 434, 1033-1035. Also, the banks of the cut were "caving" in January of 1906, almost four years before the final change (Ex 110-A at 2, Appendix J).

November 1909 (Ex 71 at 162, 174; Tr 1032-1033, 1034, 1035), witnesses viewing the area in 1910 or 1911 observed the "main body of the river" flowing in the Fischer Cut area (Tr 879-881, 939-940) while the river still ran "quite a lot" around the old channel (Tr 880, 939-940), which eventually dried up (*Compare* Ex 2, 1971 aerial photograph with Ex 15, 1936 aerial photograph). A United States Geological Survey Map of 1911-1913 shows the new configuration of the river after the change (Ex 54, 257). *See* figure 3 at 20.

C. Manner in Which the Federal Question was Raised

In its ejectment complaint the state alleged the parcels comprising Fischer Cut were part of the riverbed and owned by it by virtue of its sovereignty. In its testimony the state asserted that Fischer Cut was formed by erosion and was not avulsive (Tr 296, 514-515). In its briefs in the trial court the state asserted that what occurred at Fischer Cut was a process of erosion and submergence, not avulsion and that an avulsion did not arise where there were existing channels.

The trial court, however, while finding that Fischer Cut had existed as early as 1890, and that it carried one-fourth of the river's volume in January of 1906 (Appendix H at 85), nevertheless found that

> "6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence *converted Fischer Cut into the main channel of the river.*
>
> "7. The change was not gradual and perceptive *but was a rapid and violent change of course, avulsive in character* and constituted an avulsion" Appendix H at 85 (emphasis supplied)

The state in its opening appeal brief in the Oregon Court of Appeals stated the issues to be:

> "1. Where the smaller of two channels of a navigable river carries one-fourth of the river's flow, does the river's sudden enlargement and conversion of the smaller channel, so that it becomes the channel carrying the larger volume constitute an avulsion?"
>
> "2. Was there any evidence before the trial court from which the trial court could have concluded that the enlargement 'Fischer Cut' into the river's main channel was sudden and avulsive?"

The state then assigned as error the trial court's award of title to the disputed area to defendant (Ap Br 2, 3, 26, 34).

REASONS FOR GRANTING THE WRIT

I. Conflict of State decision with Bonelli Cattle Co. v. Arizona, 414 US 313 (1973)

The facts set out in our statement are for the most part contained in uncontradicted official Corps of Engineers' reports. The cited testimony of the witnesses (most of the references are to defendant's witnesses) is also uncontradicted and in harmony with the documentary evidence. The trial court's findings are also in

harmony with the uncontradicted facts set out herein except that the trial court's finding, inference or conclusion of an avulsion which it drew from those facts is manifestly incorrect as a matter of law for two reasons.

First, where a river flows through two existing channels and suddenly converts the secondary channel to the main channel there cannot be an avulsion because there is no sudden abandonment of an existing channel for a wholly new channel (an avulsion), only enlargement of the existing, secondary channel.

Second, what really happened in Fischer Cut, as the uncontradicted recited facts make clear, was the result of a 20-year process of erosion and submergence, the last event of which was the final enlargement of Fischer Cut resulting in the river "suddenly" converting Fischer Cut into the main channel.

The trial court held this change to be avulsive and the Court of Appeals found "evidence in the record to support this conclusion." 526 P2d at 476. The Supreme Court agreed. 536 P2d at 518.

If this application of the doctrine of avulsion is allowed to stand, however, then the principle of public ownership of navigable riverbeds enunciated by *Bonelli* has been effectively nullified. *Bonelli* declared that "in order for the States to guarantee full public enjoyment of their navigable watercourses, it has been held that

their title to the bed of a navigable river mechanically follows the river's gradual changes in course." *Bonelli* 414 US at 318. The exception to this rule arises only where ". . . 'a stream suddenly and perceptibly abandons its old channel' . . . 414 US at 327. This exception however does not include enlargement of an existing secondary channel over a 20-year period marked by erosive floods which at the end of the period is "suddenly" converted into the main channel, the former channel continuing to flow for a time (Tr 880, 939-940).

To conclude that this typical series of events constitutes an avulsion is for all practical purposes to nullify the rule of public title to navigable riverbeds.

The Court of Appeals itself, however, realized that the facts did not fit the principle of avulsion. It said, citing *Commissioners v. United States*, 270 F 110 (8th Cir 1920):

> "*But even if the doctrine of avulsion does not adequately fit the facts in the case at bar*, there is a middle course between the avulsion and accretion doctrines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in *Commissioners v. United States*, 270 F 110, 113-114 (8th Cir 1920) . . ." 526 P2d at 476-477 (emphasis supplied)

In *Commissioners*, the Arkansas River, a non-navigable river (270 F at 111), flowed in 1883 in two channels around an island. The island was within the south and main channel of the Arkansas River. In 1883 the United

States conveyed certain lands to the Indians bounded on the south and west by the main channel of the Arkansas River. By 1920, the main channel had shifted to the north channel, the south channel had dried up and the island and the south channel were one solid mass of land. The riparian owners on the bank of the old south channel claimed in opposition to the Indians that the island was theirs under the doctrine of accretion. The court disagreed, enunciating the exception to the accretion rule:

> ". . . To this rule, however, *there is a well-established and rational exception.* It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, *but by flowing around this intervening land,* which [the intervening land] never becomes in the meantime its main channel, *and the change from the old to the new main channel is wrought during many years* by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, *the boundary line between the estates remains in the old channel* subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream [citations omitted]." 270 F at 113-114 (emphasis supplied)

Thus *Commissioners* involved a boundary dispute between riparian owners on a non-navigable river. The

case held that the boundary remained in the centerline of the old, but still visible, channel. The holding, while correct, did not deal with the *Bonelli* rule of movement of the public's title to the bed of a navigable river as the river changes course. If the Arkansas River had been navigable and the issue of bed ownership by the public had also been before the court, *Commissioners* could still have ruled that the public had title to the new main channel's bed even though for boundary purposes the former main channel still served as the boundary between the two riparian owners. In other words, the exception to the accretion doctrine is applicable only to a boundary issue between two riparian owners. It does not prevent the public's title to the riverbed from following the river as it enlarges a secondary channel into the main channel.

Nevertheless the Oregon Court of Appeals relied on this case saying:

> "While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new channel but rather remained in the old main channel . . .
>
> "*Since the rule of Commissioners yields the same outcome as the avulsive theory, the same result would apply as to the title of newly submerged lands, namely, that it remains in the former owner and does not pass to the state. . . .*" 256 P2d at 477 (emphasis supplied)

The Supreme Court of Oregon agreed. 536 P2d at 518.

Both courts confused the issue of locating the boundary between two riparian owners in a two-channel situation with the issue of whether the public's title to the riverbed in that situation should follow the river as it flows through the secondary channel, which, after a period of time is "suddenly" converted into the main channel.

II. Importance of this issue.

The real issue here is whether the public has title to the beds of navigable rivers. All navigable rivers are meandering (Tr 757, 1044-1045). In the 120 years since Oregon's statehood, the Willamette River has undergone so many changes of course throughout its 200-mile length that to say this typical change was avulsive is to say in effect that the bed of the river as it presently flows, or major portions of such bed, do not belong to the state. Thus the decision means uncertainty as to title, a checkerboard of public and private ownerships in the existing riverbeds, uncertainty as to the extent[2] of those ownerships and massive, expensive and complicated litigation to establish title. Moreover, because of the *Bonelli* doctrine that the State's title is to the "[r]iverbed as a bed" it would seem that the state no longer has title to formerly submerged and submersible lands which the

[2] See the Oregon Supreme Court opinions in this case at 536 P2d 517 and 538 P2d 70 (Appendices A and B).

river has abandoned because of such "avulsive" changes. *Bonelli*, 414 US at 322, 328. Thus the state would own neither the old or the new bed if *Bonelli* means what it seems to say and the Oregon court's misapplication of *Bonelli* is allowed to stand.

CONCLUSION

Unless this court takes jurisdiction of this controversy, the ownership of navigable riverbeds in this and other states will be under a cloud because this court's definition of avulsion, namely, ". . . where 'a stream suddenly and perceptibly abandons its old channel' " *Bonelli, supra* 414 US at 427, is so cryptic as to lead to the kind of misapplication of the principle of avulsion as in the present case.

A simple solution is available, however:

(1) By definition, an avulsion should be defined so as to exclude the two-channel situation where what was once an existing secondary channel becomes the main channel over a period of time, even though the final event completing the process is sudden. The reasons: there is no change of channel only enlargement of an existing one. Moreover, the facts of nature inevitably make this truly a long-term process rather than a sudden event. *Commissioners v. United States, supra.*

(2) The rule defining avulsion should also clearly distinguish between what constitutes erosion and what

constitutes avulsion. In making the distinction the court must look to the characteristics of the river in question and determine whether the change was characteristic of the river, relatively common and therefore foreseeable (erosive) or whether the change was uncharacteristic, unusual and therefore unforeseeable (avulsive). *See, Philadelphia Co. v. Stimson,* 223 US 605, 624 (1912); *Arkansas v. Tennessee,* 246 US 158, 173 (1918); *Jefferis v. East Omaha Land Co.,* 134 US 178, 190 (1890); *State ex rel v. Warden,* 200 Okla 613, 198 P2d 402, 406-407 (1948); *Hancock v. Moore,* 135 Tex 619, 146 SW 2d 369, 370-371 (1941); *Wood v. McAlpine,* 85 Kan 657, 118 P 1060, 1065 (1911); *Nebraska v. Iowa,* 143 US 359, 368-370 (1892). In *Wood v. McAlpine, supra,* the court said:

> ". . . In view of the conditions shown however, the jury should have been given to understand that, *considering the character of the bank, and the characteristics of the stream,* including the testimony as to its habit of 'eating under,' and its effect, they must, to find avulsion determine from all the evidence that the destruction was sudden, rapid, visible, violent, of substantial amount, *and in a manner unusual along the Missouri river,* . . . 118 P at 1065 (emphasis supplied)

In accordance with this approach, violent and rapid changes in the Missouri, Mississippi, Rio Grande and Red Rivers have been treated as accretive and erosive rather than avulsive. This is because such changes are typical rather than unusual. *Wood v. McAlpine, supra*

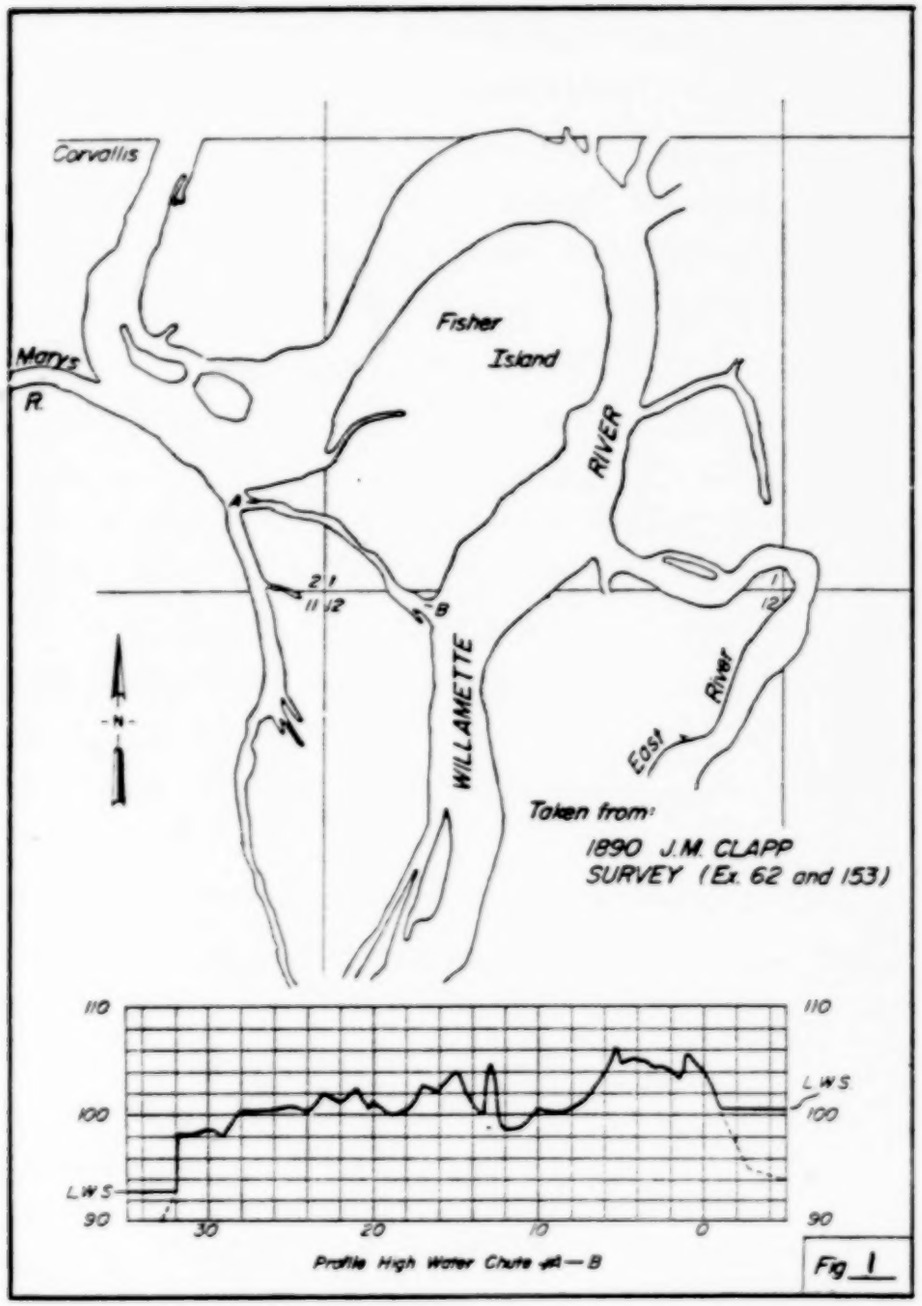
118 P at 1064, 1065; *Oklahoma v. Texas,* 260 US 606, 636-638 (1923); *Nebraska v. Iowa, supra* 143 US at 369-370; *Jefferis v. East Omaha Land Co., supra* 134 US at 190; *Denny v. Cotton,* 3 Tex Civ App 634, 22 SW 122 (1893). This element of the definition in effect provides the policy basis for determining when riparian owners should bear the loss of a change in the river because usual and foreseeable, or the public should bear the loss of the change because the change was unusual and unforeseeable.

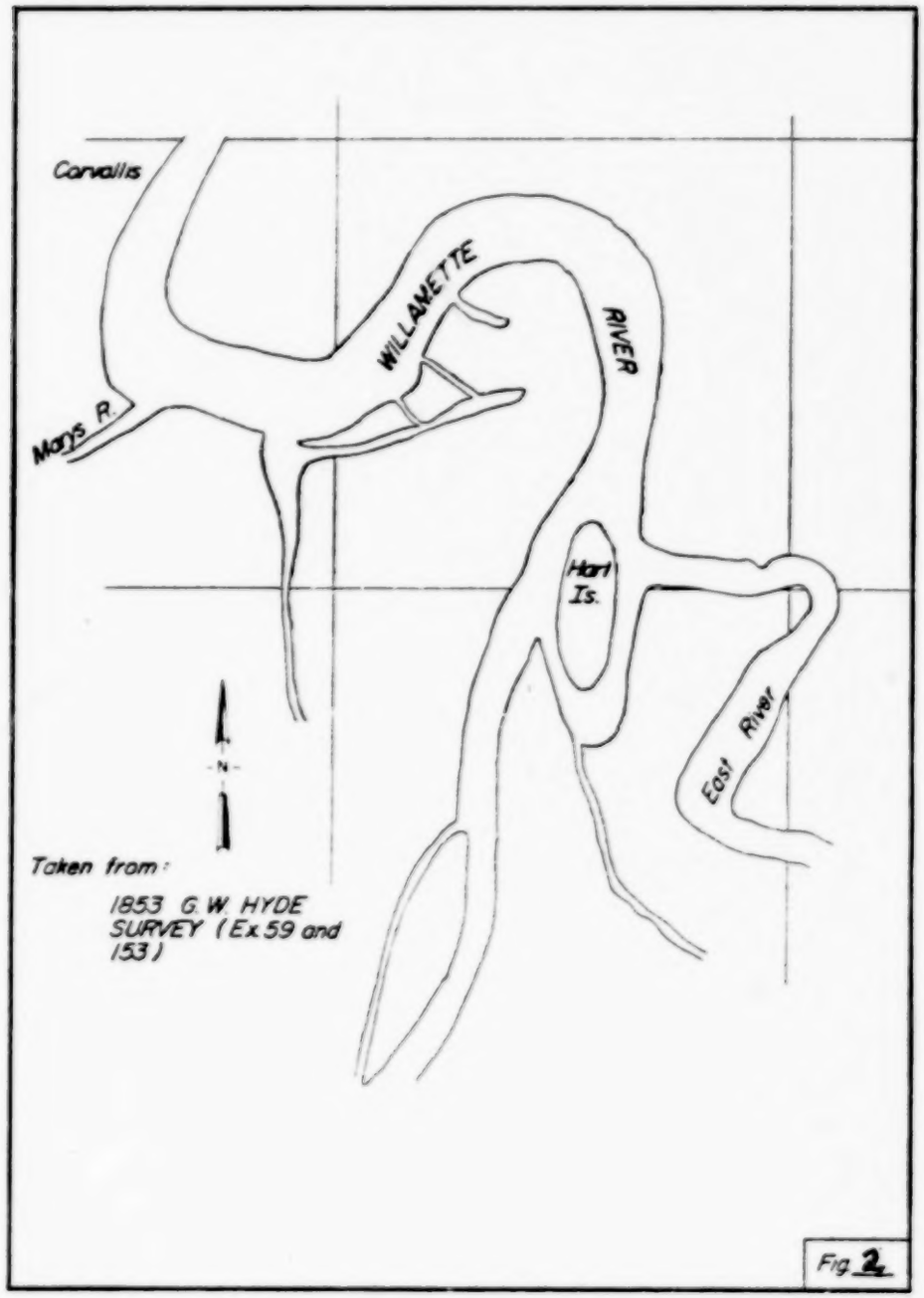
As formulated, the proposed definition is not only consistent with the federal cases, but it provides a basis for certainty in the law without the necessity of complicated litigation. Avulsions will be limited to the rare and catalysmic events that they are supposed to be. *See Pannell v. Earls,* 252 Ark 385, 483 SW 2d 440, 442 (1972).

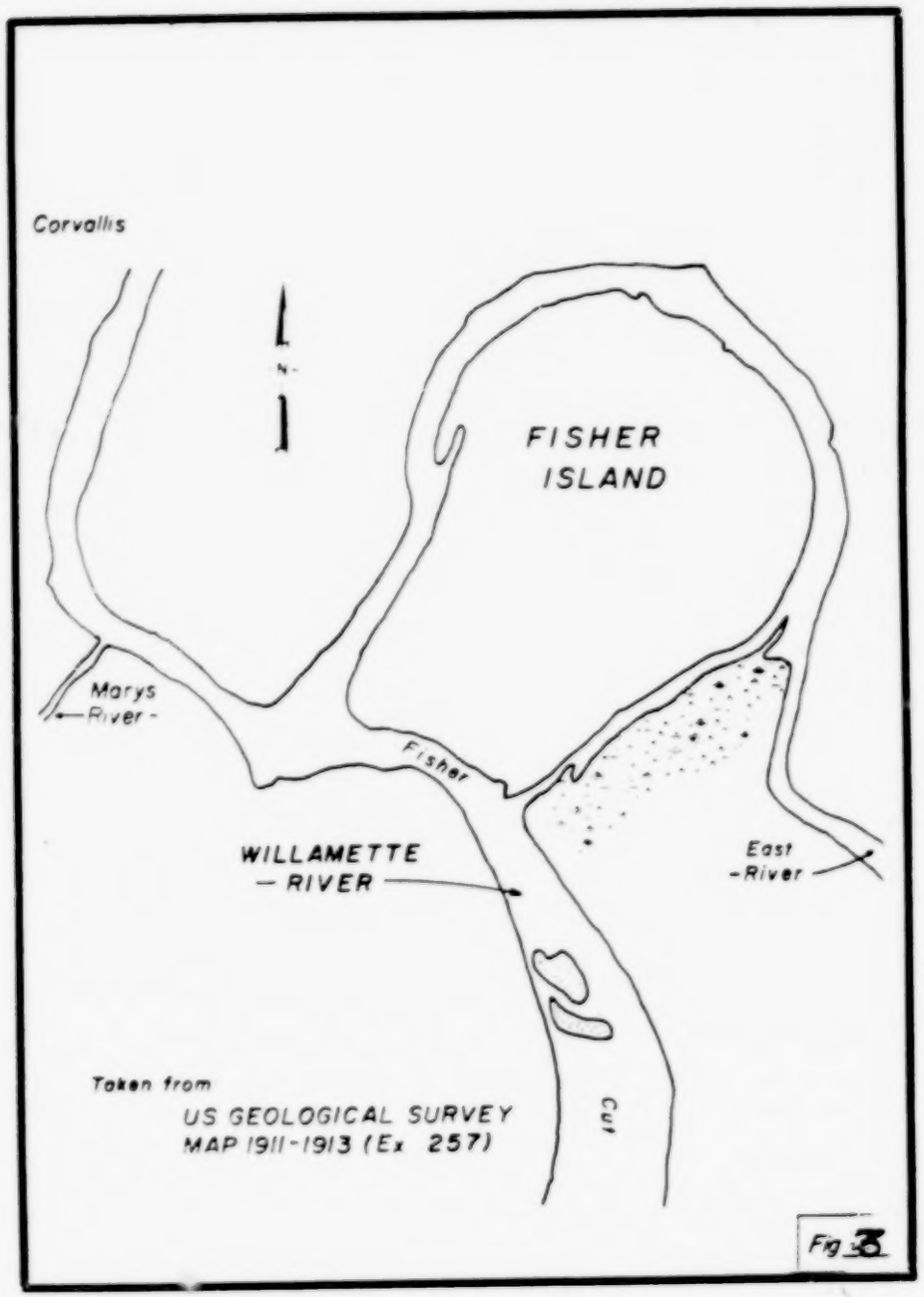
Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oregon herein.

Respectfully submitted,
LEE JOHNSON
Attorney General
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
Attorneys for Petitioner

October, 1975


Corvallis
Marys R.
Fisher Island
RIVER
WILLAMETTE
East River
Taken from:
1890 J.M. CLAPP SURVEY (Ex. 62 and 153)
110
100
90
LWS
30
20
10
0
Profile High Water Chute #1 — B
Fig 1


Corvallis
Marys R.
WILLAMETTE
RIVER
Hart Is.
East River
Taken from:
1853 G.W. HYDE SURVEY (Ex. 59 and 153)
Fig 2


Corvallis
N
FISHER
ISLAND
Marys
River
Fisher
WILLAMETTE
RIVER
East
River
Taken from
US GEOLOGICAL SURVEY
MAP 1911-1913 (Ex 257)
Fig 3

APPENDICES

APPENDIX A

OPINION OF OREGON SUPREME COURT
No. 1940—June 12, 1975

STATE EX REL STATE LAND BOARD, *Respondent—Cross-Petitioner, v.* CORVALLIS SAND AND GRAVEL COMPANY, *Petitioner.*

On Review from the Court of Appeals.

Argued and submitted April 3, 1975.

Robert Mix, Corvallis, argued the cause and filed the briefs for petitioner.

Peter S. Herman, Senior Counsel, Salem, argued the cause for respondent and cross-petitioner. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before O'CONNELL, Chief Justice, and MCALLISTER, DENECKE, HOLMAN, HOWELL and BRYSON, Justices.

AFFIRMED AS MODIFIED.

HOWELL, J.

This is an action in ejectment brought by the state pursuant to ORS 105.005 et seq. The state sought to obtain possession of the Willamette riverbed in the Corvallis area and damages for the reasonable value of the defendant's use of portions of that riverbed. The trial court awarded to the defendant certain portions of the riverbed within an area known as Fischer Cut and awarded other disputed portions to the state. Both parties appealed the judgment of the trial court to the Court of Appeals. The Court of Appeals affirmed the trial court's division of the parcels of land involved but reversed the trial court's award of damages for defendant's use of an area known as Parcel 3.

The history of this litigation and the numerous legal and factual issues are set forth in the opinion of the Court of Appeals, *Land Bd. v. Corvallis Sand &*

Gravel, 99 Adv Sh 1532, 18 Or App 524, 526 P2d 469 (1974). We agree with the Court of Appeals that there was substantial evidence in the record to support either the theory that Fischer Cut of the Willamette was formed by an "avulsive" process or by the "exception to the accretion rule" process as described by the federal court in *Commissioners v. United States*, 270 F 110, 113-14 (8th Cir 1920). We accepted defendant's petition for review solely on the question concerning the length of the Fischer Cut area through which the Willamette River has coursed since a major flood in 1909.

The trial court made the following findings regarding Fischer Cut:

> "1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.
>
> "2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.
>
> "• • • • •.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> "• • • • •.
>
> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible, but was a rapid and violent change of course, avulsive in character and constituted an avulsion.
>
> "• • • • •."

The trial court awarded Parcels 2A, 2B and 2C to the defendant. Those parcels lie between the lines of ordinary high water and encompass a riverbed distance of 1250 feet. In addition to this award, the trial court added to the length of riverbed awarded to the defendant the area downstream from the end of Parcels 2A, 2B and 2C to the confluence of the East River Channel and the Willamette River. This area come from part of Parcel 3 and was made, as the state conceded at oral argument, on the basis of the statutory grants available to riparian owners between 1874 and 1878.

On appeal to this court, the state maintains that the trial court's findings regarding the length of Fischer Cut are correct. However, Corvallis Sand & Gravel contends that Fischer Cut is 3200 feet in length and that the trial court's finding of the length of the Cut is not supported by the evidence.

The evidence concerning the length of Fischer Cut consists of various documents and testimony. The asserted 1250-foot length of Fischer Cut coincides with the linear riverbed distance of Parcels 2A, 2B and 2C which the state first claimed in its 1969 complaint. The state argues that portions of the Fischer Cut area eroded away between 1890 and the 1909 flood. At trial, the state's expert witness, Ronald McReary, utilized a 1936 aerial photograph to point out an alleged cut-bank on the upstream side of Parcels 2A and 2B, thus suggesting that the Cut was only 1250 feet long. The state also relied upon the testimony of one of its witnesses, Fred Fischer, who, as a boy, roamed through the area of Fischer Cut and who testified that the Willamette River moved east and took several acres of land with it. However, the state, in attempting to prove its erosion theory and the 1250-foot figure, relies on documentary evidence showing the area *after* the 1909 flood. Further, Mr. Fischer's testimony, taken as a whole, fails to explain whether the erosion he referred to occurred before or after 1909.

The evidence that Fischer Cut at the time of the 1909 flood was 3200 feet in length is substantial and highly persuasive. The trial court found that in 1906 the Fischer Cut was in practically the same location as it was in 1890 and that until 1909 the Willamette River continued to flow around Fischer Island. In 1890 the U.S. Army Corps of Engineers carefully mapped this stretch of the Willamette River, including the area of Fischer Cut. The 1890 Clapp map shows the existence of an overflow channel in the Fischer Island area. Both parties stated that this map was carefully drawn and prepared. The scale shows that the overflow channel from "upstream" to "downstream" points is approximately 3200 feet in length.

Later, in 1906, three years before the flood, Major G. W. Roessler of the Corps of Engineers sent Assistant Engineer David B. Odgen to examine the overflow channel in the area of what today is known as Fischer Island. Ogden's report to Roessler states, in pertinent part:

> "The channel in question is across the neck of a peninsula and is some 3200 feet long, while the distance around by the main river is two and one-quarter miles.
>
> "This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to its foot is noted as about 8 feet. The approximate present location is shown in dotted lines on the sketch herewith."[1]

In addition, the state's witness stated on cross-examination:

> "• • • I would say the best evidence of it [the length of the eroded chute] is the distance shown on the map of 1890 which appears to be a very carefully prepared and well-engineered drawing and I would say that that is the length of the gully that eventually eroded into what is now the bed of the river."

[1] The distance on the sketch accompanying the engineer's report scales at slightly less than the 3200 feet stated in the body of the letter. However, the 1906 sketch did not purport to represent the exact length of the cutoff or overflow channel, only its approximate location.

We find that the best evidence of the length of Fischer Cut at the time of the 1909 flood is the 1890 map, which both parties agreed was carefully prepared and which shows Fischer Cut to be approximately 3200 feet in length.

It is difficult, based on the present record, to correlate the length of Fischer Cut in 1909 to the topography as it existed at the time of trial. We do find, however, that the length of Fischer Cut as it existed in 1909 at the time of the flood is best represented by the channel from point A to point B as shown on the 1890 map. We remand this action to the Court of Appeals with directions to remand to the trial court to correlate points A and B with the present topography of the area. Additional testimony may be taken if necessary. Also, on the remand, the trial court should modify or adjust any damages in accordance with our decision herein expanding the length of Fischer Cut. In all other respects the decision of the Court of Appeals is affirmed.

Affirmed as modified.

APPENDIX B
OPINION OF OREGON SUPREME COURT
No. 1940—July 17, 1975

IN BANC*

STATE EX REL STATE LAND BOARD, *Respondent-Cross-Petitioner, v.* CORVALLIS SAND AND GRAVEL COMPANY, *Petitioner.*

On review from the Court of Appeals.

Upon respondent-cross-petitioner's petition for rehearing filed June 20, 1975, and petitioner's petition for rehearing filed July 3, 1975.

Lee Johnson, Attorney General, W. Michael Gillette, Solicitor General, and Peter S. Herman, Senior Counsel, Salem, for the respondent-cross-petitioner.

Robert Mix, Corvallis, for the petitioner.

PETITIONS FOR REHEARING DENIED; ORIGINAL OPINION CLARIFIED.

HOWELL, J.

In our original opinion we emphasized that we accepted the defendant's petition for review of the decision of the Court of Appeals on the sole issue of the length of Fischer Cut as it existed at the time of the 1909 flood. We held that the length of Fischer Cut as it existed in 1909 was best represented by the channel from Point A to Point B as shown on the 1890 map and remanded the cause with directions to the trial court to correlate Points A and B with the present topography of the area and to modify or adjust any damages accordingly.

Both parties have filed petitions for rehearing. The defendant's petition raises no new matter and is denied. The petition of the plaintiff, the State of Oregon, expresses concern that our opinion could be

* Tongue, J., did not participate in this decision.

interpreted to include as an award to defendant a portion of the riverbed in Parcel 3 which the plaintiff leased to the defendant in 1963 and which defendant has admitted in its pleadings that it had no ownership therein.①

To prevent any misunderstanding, our former opinion is clarified to the following extent: if correlating Points A and B of Fischer Cut results in any portion of that length falling within a portion of the riverbed to which the defendant has disclaimed ownership, then the ownership of plaintiff remains unaffected.

Both petitions for rehearing are denied.

① The plaintiff leased to defendant "That portion of the bed of the Willamette River owned and controlled by the State of Oregon *beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream* 4,000 feet, all in Section 2, Township 12 South, Range 5 West, Willamette Meridian." (Emphasis supplied)

The defendant's amended answer alleged: "Defendant is the owner in fee simple of the property described in defendant's amended complaint, *except that defendant does not own that portion leased by plaintiff to defendant* * * *." (Emphasis supplied)

APPENDIX C

OREGON SUPREME COURT CLERK'S LETTER OF AUGUST 6, 1975 NOTIFYING RESPONDENT (defendant) OF COURT'S DENIAL OF ITS MOTION

LOREN D. HICKS
State Court Administrator

August 6, 1975

Mr. Robert Mix
Attorney at Law
745 N. W. VanBuren
Corvallis, Oregon 97330

Re: State v. Corvallis Sand and Gravel Co.

Dear Mr. Mix:

The Supreme Court today denied respondent's motion to withdraw or suspend clarification of opinion with regard to the above-entitled case.

Very truly yours,

A J
Adell Johnson
Assistant Administrator

AJ/t

cc: Mr. Peter S. Herman
Senior Counsel
100 State Office Building
Salem, Oregon 97310

APPENDIX D

JUDGMENT OF OREGON SUPREME COURT

Entered June 12, 1975

STATE OF OREGON

SUPREME COURT

Mandate

STATE OF OREGON, Acting by and through
the STATE LAND BOARD,
Respondent, Cross-Petitioner,
v.
CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,
Petitioner.

Appeal from BENTON County
On Review from Court of Appeals

This cause on April 3, 1975, having been duly argued and submitted upon the sole issue arising on defendant's petition for review from the Court of Appeals, and the court having fully considered said issue as well as suggestions of counsel in their argument and briefs finds that the decision of the Court of Appeals should be affirmed as modified.

IT THEREFORE IS ORDERED and ADJUDGED that the decision of the Court of Appeals is affirmed as modified and the cause is remanded to the Court of Appeals with directions to remand to the trial court for

further proceedings in conformity with the opinions of the court herein.

ENTERED at Salem, Oregon, this 12th day of June. 1975.

APPENDIX E

OREGON SUPREME COURT CLERK'S LETTER FEBRUARY 28, 1975 RE ACCEPTANCE OF REVIEW

LOREN D. HICKS
State Court Administrator

January 28, 1975

Mr. Peter S. Herman
Senior Counsel
State Office Building
Salem, Oregon 97310

Mr. Robert Mix
Attorney at Law
745 N. W. VanBuren
Corvallis, Oregon 97330

Re: State ex rel State Land Board v. Corvallis Sand & Gravel Company

Gentlemen:

With Justice Thomas Tongue not participating, the Supreme Court today allowed defendant's petition for review and denied plaintiff's petition for review in the above case.

The matter will be set for argument the first week of March and you will receive later notification of the exact day and time.

Very truly yours,

ADELL JOHNSON
Adell Johnson
Assistant Administrator

AJ/t

APPENDIX F

OPINION OF THE OREGON COURT OF APPEALS

No. 1940—September 9, 1974

STATE EX REL STATE LAND BOARD, *Appellant–Cross-Respondent, v.* CORVALLIS SAND AND GRAVEL COMPANY (No. 21512), *Respondent–Cross-Appellant.*

Appeal from Circuit Court, Benton County.

RICHARD MENGLER, Judge.

Argued and submitted July 15, 1974.

Peter S. Herman, Senior Counsel, Salem, argued the cause for appellant–cross-respondent. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Robert Mix, Corvallis, argued the cause and filed the briefs for respondent–cross-appellant.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED IN PART; REVERSED IN PART.

SCHWAB, C. J.

This is an action at law in ejectment by the state pursuant to ORS 105.005, et seq., to recover possession of 11 described parcels of real property constituting portions of the bed of the Willamette River near Corvallis, and to recover damages for the reasonable value of the use of such parcels.

In 1958 the state filed a suit to quiet title to the land adjoining certain lots, which lots constitute a portion of the property in dispute now. In 1959, at trial, the case was dismissed without prejudice on

motion for a voluntary nonsuit for failure of proof. In 1960 the state filed a suit for an accounting and an injunction covering the area in dispute in the case at bar. This case was voluntarily dismissed in 1961 by the state before it was at issue.

The first complaint in this action was filed by the state on June 7, 1965. In the complaint the portion of the riverbed in dispute was described as one parcel; the portions of the riverbed now constituting Parcels 2A, 2B and 2C were omitted. Instead of answering, the defendant filed a complaint in equity seeking to permanently enjoin the state's ejectment action. The state demurred to the complaint. The trial court overruled the demurrer and a decree was entered in favor of Corvallis Sand and Gravel. On appeal the Supreme Court reversed. *Corvallis Sand & Gravel v. Land Board,* 250 Or 319, 439 P2d 575 (1968).

On December 23, 1969, the plaintiff filed its first amended complaint in ejectment in which it described the riverbed it sought to recover as 11 separate parcels and claimed damages for the use of each parcel. On July 7, 1970, the defendant filed its answer, denying the allegations of the complaint and raising 12 affirmative defenses. After procedural disputes leading to several amended answers, trial was held before the court without a jury, commencing October 11, 1971.

On May 25, 1972, the trial court issued a memorandum opinion awarding various parcels to each party and setting the amount of damages for the previous use by defendant of those parcels awarded to the state. Findings of fact and conclusions of law were entered on June 19, 1972. The court supplemented

these findings on July 28, 1972, and judgment was entered the same day. The state appeals from that portion of the order which awards parcels described for the purposes of this litigation as 2A, 2B and 2C to the defendant, on the ground that it erred in finding that these parcels were formed by avulsion, and from the failure of the trial court to award interest on the money judgment from the date of taking by defendant to the date of the judgment. The defendant cross-appeals from a variety of procedural rulings of the court, and the striking of certain of its affirmative defenses, the award of certain parcels to the state, and the award of damages. For the reasons which follow, we affirm the trial court in all its rulings and its judgment with the exception of one relatively minor item of damages which we reverse.

I. Scope of Review

The scope of appellate review of the facts presented in this case was stated in *Reif v. Botz,* 241 Or 489, 496, 406 P2d 907 (1965):

> "* * * On appeal in an action at law from findings of fact by a trial court sitting without a jury, this court cannot again place the evidence on the scales to see which side preponderates. We must confine ourselves to a search of the record for some evidence to support the findings. If we so find * * * those findings cannot be disturbed."

See also, May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971); *State Highway Com. v. DeLong Corp.,* 9 Or App 550, 495 P2d 1215, Sup Ct *review denied* (1972), *cert denied* 411 US 965 (1973). The various findings of fact as to the formation of the various parcels and the amount of material removed

from each parcel must be reviewed in light of this standard.

Much of the dispute in this case centers around the difference in testimony of the expert witnesses of the parties. The credibility of the various witnesses and the weight to be given to their testimony is a matter for the trial court and will not be passed upon again by this court in a law action. *Armbrust v. Travelers Ins. Co.,* 232 Or 617, 376 P2d 669 (1962).

Finally, we should note that when we state facts in this case, we are using the findings of fact of the trial court in all instances in which there is a conflict in the evidence.

II. Ownership of the Parcels in Dispute

This litigation involves ownership questions of certain parcels of the bed of the Willamette River[1] near Corvallis, Oregon, which parcels lie between ordinary high watermarks in an area bounded by the Mary's River on the north or downstream end, and the City of Corvallis Water Treatment Plant to the south or upstream end. For the purposes of this litigation, the state, in its complaint, divided this section of the river into 11 separate parcels.[2] On appeal, the ownershp of eight of these parcels is in issue.

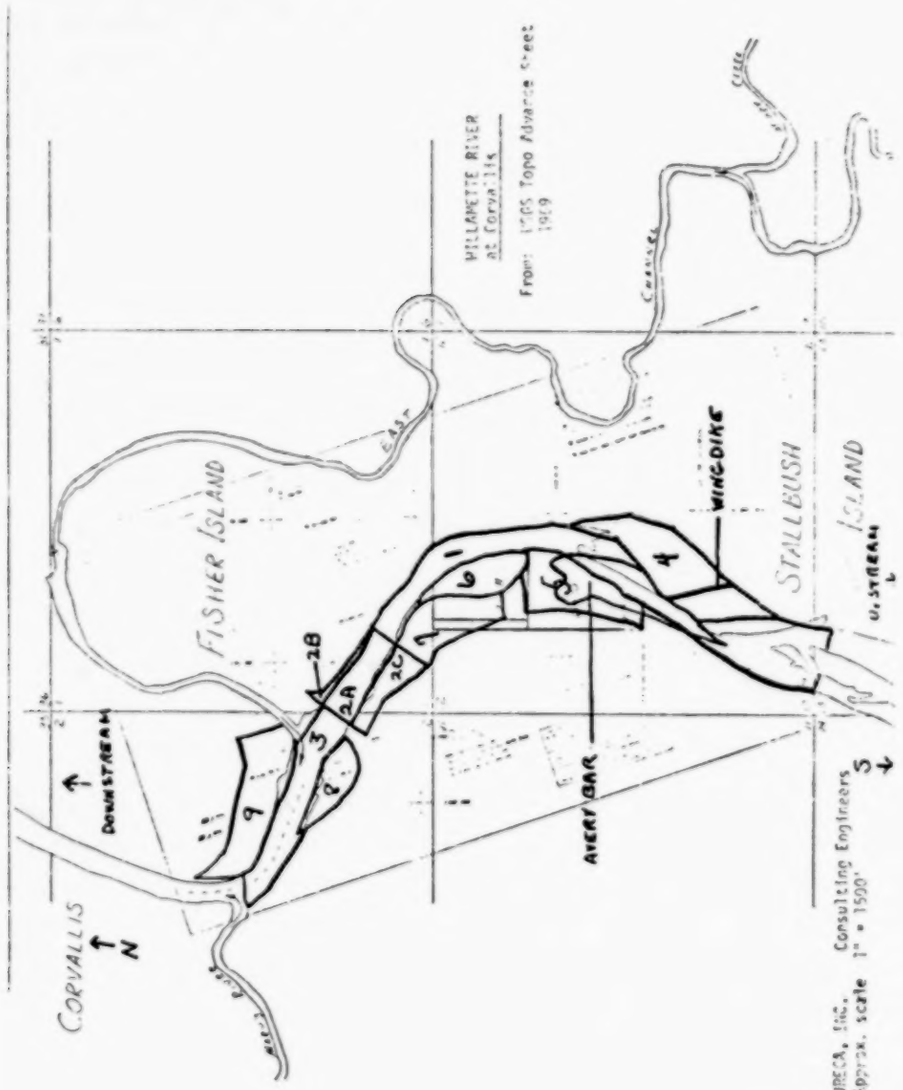
In order to put the ownership question into perspective, a brief overview of the facts is necessary. Prior to the latter part of 1909, the northerly portion

---

[1] Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation. For a comprehensive view of the geography of the disputed area, *see* map at 1536.

[2] For a discussion of the propriety of splitting the disputed area into separate parcels and causes of action, *see* pp 1564-1566, infra.

of the Willamette River now shown on the attached map as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of what is shown as Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main



channel at a point to the northwest of Parcels 2A, 2B and 2C. The area shown on the map as Parcels 2A, 2B and 2C, and described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable.

With regard to Parcels 2A, 2B and 2C, the issue involves the consequences of this change of channels, with the state claiming ownership by virtue of its sovereignty over navigable waters and the application of an erosion principle. The defendant contends that the change was actually avulsive and that, in any event, the state's sovereignty does not extend to the bed of the river included within these parcels.

With regard to other of the parcels the issue is who was holder of the original title. Finally, with some parcels, the issue arises because of formations of islands within the bed of the river, accretions thereto, removal of gravel deposits by the railroad, the construction of a wingdike in 1948 by the Army Corps of Engineers, and the general erosive and accretive processes of the river over the course of time.

The trial court awarded Parcels 2A, 2B and 2C to the defendant, and all the others to the state. Both parties raise a variety of factual and legal contentions in opposition to the findings and conclusions of the trial court. We will treat each parcel separately recognizing that, to some degree, the factual discussion as to each parcel will overlap somewhat the general discussion above.

A. Parcels 2A, 2B and 2C (Fischer Cut)

As indicated on the map, Parcel 2A is comprised of bottom land of the Willamette River between ordinary low water. Parcel 2B is riverbed between ordinary high and ordinary low water on the right bank of the river. Parcel 2C is riverbed between the ordinary high water and ordinary low water on the left bank of the river. The trial court made the following findings of fact concerning the area within the Fischer Cut:

"1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

"2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

"3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

"4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

"5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

"6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."

The state argues that ownership of the entire Fischer Cut area passed to the state by virtue of its sovereignty over navigable waters regardless of the manner of the formation of the cut. It also argues that regardless of the state's sovereignty, title to the Fischer Cut river bottom passed to the state because the Fischer Cut did not result from an avulsive change since an existing channel of the river was present prior to its enlargement. Defendant argues that the change was avulsive and that, in any event, *Bonelli Cattle Co. v. Arizona,* 414 US 313, 94 S Ct 517, 38 L Ed 2d 526 (1973), controls the ownership question.

1. The Sovereignty Issue

Under the equal-footing doctrine, as new states were admitted to the Union, they entered with the same rights, sovereignty and jurisdiction as the original states possessed within their respective borders. Accordingly, under the equal-footing doctrine, title to the lands beneath navigable waters passed from the federal government to the state of Oregon upon its admission to the Union. *Bonelli,* 38 L Ed 2d at 534; An Act for the Admission of Oregon into the Union, ch 33, 11 Stat 383. Further, under the Submerged Lands Act, 43 USC § 1301 (a) (1), the federal government quitclaimed all federal title to lands beneath navigable streams, as modified by accretion, erosion or reliction. By virtue of its sovereignty over navigable

waters, the state contends that its title to the bed of the Willamette River follows the course of the river wherever it may move. Otherwise, the state argues, the bed will become a "checkerboard" of public and private ownership, seriously impairing the public use of the waters.

Questions of title to beds of navigable rivers must be evaluated in light of *Bonelli Cattle Co. v. Arizona,* supra. In *Bonelli,* the Supreme Court recognized the principle that it would be left to the states to determine what rights they would accord riparian owners in the beds of navigable streams which under federal law belong to the state. However, the question of how far the state's sovereign right extends under the equal-footing doctrine and under the Submerged Lands Act was found to involve a question of right asserted under federal law and, thus, federal common law would apply.

While *Bonelli* involved title to lands formerly under the main channel that had since become dry, the basic public policy discussion is equally applicable to the case where certain lands which were not under water are presently under water. The court in *Bonelli* first noted that, historically, title to the beds beneath navigable waters is held by the sovereign as a public trust for protection of navigation and related purposes. The court continued:

> "'Such waters • • • are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing • • •.' Shively v. Bowlby • • •

> [152 US 1, 11, 38 L Ed 331, 14 S Ct 548 (1894)]."
>
> "The State's title is to the 'riverbed as a bed' • • •." *Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d at 536.

The fundamental purpose of the original grant involves navigational and related interests and the state can often protect these interests by holding a navigational servitude rather than by holding title to the bed.[9]

While the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, *see, Bonelli Cattle Co. v. Arizona,* supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose. The only public purpose cited by the state deals with the question of public recreation in terms of wading, fishing, boating or swimming. However, such rights can be controlled under the navigational purpose doctrine, and title to the bed, asserted here only for the extraction of royalty payments, is not necessary. Certainty of title and other arguments raised by the state under its sovereignty argument do not relate to this legitimate state interest in control of navigation and fishing.

The first portion of *Bonelli* thus stands for several basic propositions. First, the extent of title to submerged lands and navigable waterways must be determined by federal common law. Second, the state's

---

[9] The court directs the reader to Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion,* 14 Ariz L Rev 315 (1972), wherein the author speaks in terms of title being burdened with the state's "navigational easement." *See,* Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526, 536, n 12 (1973).

interest in the bed of navigable waters is basically that of the control of navigation, fishing and other related public goals. So the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to *Bonelli* and other federal cases to determine whether title to the bed passed to the state under the facts presented in the case at bar.

2. Nature of the Change in the River's Course

The court in *Bonelli* first noted that federal law recognizes the doctrine of accretion whereby the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along the shore. The court then discussed a number of interrelated policy reasons for the application of doctrine of accretion, which reasons refer to the risk a riparian owner runs that his land could be eroded by the action of the adjoining waterway. Under the court's analysis loss of land on a navigable waterway by a riparian owner to erosion would result in title to the bed passing to the state. *See, Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d 534, 536-37.

As defined in *Bonelli,* 38 L Ed 2d at 538, and other federal cases,[4] the doctrine of accretion requires the gradual, imperceptible accumulation of land on a navigable river bank. As found by the trial court and admitted by the state, there was no gradual addition or accumulation of land in this case. Rather, the river started to flow through a new channel. Since the accretion doctrine does not apply, the question is what this change to a new channel is denominated under

[4] *See,* Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912).

federal common law and how such a change affects title to the riverbed.

One possibility is that this change was avulsive, as found by the trial court. As defined in *Bonelli,* 38 L Ed 2d at 539, an avulsion occurs where a stream suddenly and perceptibly abandons its old channel. Other federal cases state that such change must be visible in its progress. *See, St. Louis v. Rutz,* 138 US 226, 11 S Ct 337, 34 L Ed 941 (1891). Such an avulsive change does not affect title to the lands submerged by the water since this is not one of the risks run by a nonriparian landowner. *Bonelli Cattle Co. v. Arizona,* supra; *Philadelphia Co. v. Stimson,* 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912); *St. Louis v. Rutz,* supra. While title does not change, the submerged lands do become subject to the public right of navigation, fishing and other related public purposes. *See* discussion, supra, at 10-11. The trial court found that the change in the Fischer Cut area was sudden and perceptible and, thus, constituted an avulsion. We find evidence in the record to support this conclusion.[5]

But even if the doctrine of avulsion does not adequately fit the facts in the case at bar, there is a middle course between the avulsion and accretion doc-

[5] The state relies heavily upon Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964), to support its position that this change was not avulsive in nature. First, it should be noted that federal common law controls ownership questions under *Bonelli* and, thus, state cases are of limited applicability. Second, *Purvine* did not involve the question of the state's ownership of the riverbed but rather involved boundary questions. Finally, the court found that an avulsive change had not been proved on the facts and that, for policy reasons, the court did not wish to apply the avulsion theory because of the effect that theory could have on boundary questions in the future.

trines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in *Commissioners v. United States,* 270 F 110, 113-14 (8th Cir 1920):

> "• • • [The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream • • •."

While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new main channel but rather remained in the old main channel. In fact, at least one court claims that the rule in *Commissioners* was a rule of avulsion. *See, Durfee v. Keiffer,* 168 Neb 272, 95 NW2d 618 (1959). The rule of *Commissioners*

was apparently recognized in *Kansas v. Missouri,* 322 US 213, 64 S Ct 975, 88 L Ed 1234 (1944).

Since the rule of *Commissioners* yields the same outcome as the avulsive theory, the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state. The government will hold the paramount navigational servitude, but will not become the owner of the submerged lands.

3. Conclusions

There are several conclusions we distill from *Bonelli* and other cases dealing with navigable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose. Lands granted to the state of Oregon upon its admission in 1859 which were under water and are still under water belong to the state of Oregon at this time. While the grant of the bed in 1859 is not absolutely necessary for the paramount public purpose of control of navigation, it was, perhaps, the way the Congress felt the question of title to riverbeds should be determined. It can also be determined from *Bonelli* that where a bed of a river shifts by a slow process of erosion or accretion, title of the state to the bed of the river follows the change. However, where there is an avulsive change or a change that, under *Commissioners,* is treated like an avulsive change, the state does not obtain title to land under the water as it presently flows. The state's interest in navigation and other related purposes does not extend to a need for ownership of the riverbed.

Adequate evidence was introduced to support either the theory of avulsion as found by the trial court or a situation similar to that in *Commissioners*. But under either theory, the outcome is the same—the ownership of the land under the river does not change. The ownership of the overflowed lands in Parcels 2A, 2B and 2C remains with the owner of those lands before the changes of 1909, subject only to the paramount navigational servitude held by the state. This portion of the judgment of the trial court is affirmed.

B. Parcel No. 1

Parcel No. 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant, and its downstream limits coinciding with the upstream limits of Parcel 2A. The trial court ruled that Parcel 1 belonged to the state. There are three separate issues involves in the ownership question of Parcel No. 1: (1) the length of the Fischer Cut; (2) the ownership of an area denominated the Avery Bar; and (3) the effect of the U.S. Army Corps of Engineers' wingdike. These will be treated separately.

1. Length of the Fischer Cut

The defendant contends that the change of 1909, which it terms an avulsion, extended a distance of 3200 feet upstream from the downstream ends of Parcels 2A, 2B and 2C, and, therefore, included a portion of Parcel 1. The trial court ruled that the Fischer Cut did not extend upstream above Parcels 2A, 2B and 2C. However, the court did find that a small portion of Parcel 3 was included within the limits of Parcels 2A,

2B and 2C. This makes the cut area approximately 1600 feet in length. There is ample evidence both in the maps and in testimony of the state's expert witness to support this finding. The cut did not extend into Parcel 1.

2. The Avery Bar Issue

The Avery Bar area extends from Parcel 5 through Parcel 1. The defendant contends that when the Avery Bar was removed for gravel purposes by the railroad in the early twentieth century, the river moved back in over the excavated land. It argues that Avery Bar arose as an accretion from Parcels 5 and 6 which the defendant also contends it owns and, as such, when it was covered by water, it still belonged to the defendant. The trial court made the following finding of fact:

"• • • • •

"3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

"4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

"5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

"6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10 [Parcel 5].

"7. Thereafter, a point bar developed on top of the joinder.

"8. Thereafter, the railroad in 1913 removed most of the bar by dredging large quantities of rock and gravel.

"9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10 [ownership of these lots discussed infra at 1551-1553].

"10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

"11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914."

It is established that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is a property of said riparian proprietor. *St. Louis v. Rutz,* supra, 138 US at 245. Further, the owner of an island is entitled to land added thereto by accretion. 65 CJS 261, Navigable Waters § 82 (6).

Once again the facts settle into separate positions taken by the parties' expert witnesses. The state's witness claimed that the Avery Bar started as an island and that the deposits accreted to the island. The defendant's witness, on the other hand, contended that Avery Bar was an accretion to the uplands, namely Parcels 5 and 6, which the defendant claims it owns. There is evidence to support the trial court's finding and it is affirmed.

3. 1948 Corps of Engineers' Wingdike Formation

Much of this argument overlaps the Avery Bar argument, supra. The defendant contends that a wingdike constructed by the Corps of Engineers in 1948 further covered part of Parcel 1 made up of the Avery Bar area. It again argues that Avery Bar was an accretion to the uplands which the defendant owned and that the avulsive change caused by the wingdike allowed ownership of the land of Avery Bar to continue in defendant. The trial court's finding of fact in the matter is set out in full, supra. There is evidence to support these findings.

C. Parcel 3

Parcel 3 lies in the bed of the river between ordinary low watermarks and runs from the upstream end of Parcel 2A past the confluence with the East River to a point approximately equal to the confluence with Mary's River. On July 1, 1963, the state leased to the defendant for a term of ten years that portion of Parcel 3 beginning at the confluence with the East River and extending downstream for approximately 4,000 feet. The trial court split Parcel 3, awarding the downstream portion from the confluence with the East River to the state, and the upstream portion from the confluence of the East River to the defendant, finding that it was within the Fischer Cut. The state appeals from that portion of the decree awarding the area upstream of the East River to defendant. There is evidence supporting a finding that the portion upstream from the confluence of the East River was included within the Fischer Cut. Under *Bonelli* and related cases, title to that land remained in the original owner.

D. Parcel 4

On appeal, defendant has abandoned all claim to this parcel so it need not be discussed herein.

E. Parcel 5

Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river. The trial court awarded this parcel to the state below the ordinary high watermark. The defendant argues:

1. That the northerly one-third of Parcel 5 is included in the avulsive change of Fischer Cut;

2. That a portion of Parcel 5 is included in the Avery Bar area; and

3. That the Corps wingdike of 1948 was an artificial change of channel which worked no change of title, and was an artificial avulsion.

The trial court made the following findings of fact:

> "1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.
>
> "2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76."

The question of the length of the Fischer Cut and the formation of the Avery Bar has already been discussed above. There is evidence to support the trial court's ruling that Parcel 5 was not within the avulsive change and that the Avery Bar did not form as an accretion to Parcel 5.

There are still several portions of Parcel 5, however, that do not fall in either the Fischer Cut or Avery Bar category. The question to be resolved as to these areas involves a United States patent to certain lands and Acts of the Oregon legislature in 1874 and 1878.

In 1874, the legislature granted the area on the Willamette River between low and high water to adjacent riparian owners. General Laws of Oregon 1874, p 76.

In 1875, defendant's predecessor in interest, one Norring, filed for a homestead on Government Lots 9, 10 and 12; Parcel 5 is the area between high and low water fronting Lots 9 and 10. On October 18, 1878, the Governor signed a law repealing the statutory grant of land between high and low water on the Willamette River. General Laws of Oregon 1878, § 34, p 54. The patent to Government Lots 9 and 10 was not issued to Norring by the United States government until April of 1882. The question thus presented is whether Norring was an "owner" within the contemplation of the Oregon statute when he settled on the property in 1875 and, if not, did the patent obtained in 1882 relate back to his original entry in 1875 rendering him an owner within the contemplation of the statute.

In support of his contention that Norring was an "owner," defendant relies upon *Faull v. Cooke,* 19 Or 455, 26 P 662, 20 Am St R 836 (1890), in which the court determined what rights a homesteader acquired in land by virtue of his homestead settlement and subsequent compliance with the Act of Congress granting homesteads to actual settlers upon the public lands of the United States and the issuance to him of a patent therefor by the United States. In *Faull* the court found that a homestead patent related back to the date of settlement. However, the question here concerns not homestead rights but the granting of the state lands between high and low water to the owner of riparian lands bordering thereon. *State v. McVey,* 168 Or 337,

121 P2d 461, 123 P2d 181 (1942), speaks more nearly to the point. In *McVey* the court considered the question of ownership of a gravel bar between high and low water. The court first noted that General Laws of Oregon 1874, p 76, did not vest title in the bed between high and low water in the federal government. The court then construed the statute and tried to determine the intent of the legislature and the historical background of the legislation. The court first noted in *McVey,* 168 Or at 353-54:

> "* * * It was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua rivers had treated the river beds between high and low water marks as private property and had sometimes improved such parts of the river beds by the erection of expensive structures, that the legislature amended the 1872 enactment so as to protect them and their investments by making a grant of the beds of those rivers above low water mark to the riparian owners * * *.
>
> "The legislature was concerned with private ownership of property abutting upon tide lands and property adjacent to the beds of certain designated navigable rivers. It was not concerned with the United States as owner of any such lands. * * * It may be noted * * * that the act did not grant to a settler the right to purchase the tide land until *after* he had received a patent from the federal government." (Emphasis supplied.)

Norring did not become an "owner" until after he had received the patent from the federal government. Since he did not receive the patent until after the date of the repeal of the Act authorizing him to obtain ownership of the land between high and low watermarks, he was not an "owner" within the terms of the statute.

The defendant's second argument is that the patent received by Norring in 1882 related back to his entry on March 15, 1875, when the statute granting ownership to the low water level was in effect. Defendant again cites numerous cases involving homestead law in which the patent does relate back to the date of entry insofar as it cuts off a title of one who enters after the original entryman. As made clear in *State v. McVey,* supra, the disposition of these lands is controlled by state law, and the doctrine of relation back will not apply.

Defendant makes reference to ORS 105.070 in support of his relation back claim. That statute declares that in an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Donation Law, such party from the date of his settlement on the property is deemed to have a legal estate and fee in the property. This statute originated in 1862 in General Laws of Oregon, § 329, p 230 (Deady 1845-1864), well before the statutes in question here and the decision in *State v. McVey,* supra. Also, this refers to lands owned by the United States government and passed under the homestead acts. It does not control the later state legislative enactments dealing with the state's land between high and low water.

F. Parcel 6

Parcel 6 also lies in the left bank of the river and consists of land between ordinary high and ordinary low water. Defendant contends that Parcel 6 is in actuality Government Lot 11 of Section 12 which was patented by the defendant's predecessor in title

before the repeal of the 1874 statute. The state admits that the patent on Government Lot 11 was completed prior to the repeal of the laws of 1874, but contends that Government Lot 11 has eroded away completely and that Parcel 6 arose from an island in the river that joined by accretion to the uplands.

The trial court made the following findings of fact:

"1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

"2. Parcel 6 is not within the avulsive channel of Fischer Cut.

"3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

"'4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11.'"

Both parties agree that defendant's predecessor in title acquired rights in Government Lot 11 and the submersible lands fronting it, so paragraph 3 of the findings of fact is incorrect. However, there was adequate evidence introduced to support the finding that Government Lot 11 eroded away and that Parcel 6 formed in the bed of the river and accreted to the uplands. So long as this parcel remains submersible, title will remain in the state. *See, Bonelli Cattle Co. v. Arizona,* supra.[6]

[6] The court in *Bonelli* adopted the doctrine of re-emergence:

"Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges

(Continued on page 57)

G. Parcel 7

Parcel 7 is in an area between ordinary high and ordinary low water on the left side of the river. It consists of part of Government Lot 13, Section 12, and the Alexander Donation Land Claim. The defendant contends on appeal only that Parcel 7 was within the alleged avulsive change of 1909 occurring in the Fischer Cut area and, therefore, should belong to the defendant. The trial court found that it was not within the cut. There is evidence to support this finding.

III. Procedural Questions Relating to Damages

The defendant raises several assignments of error relating to the damages awarded by the court for those parcels given to the state. The defendant first contends that the state's failure to use an *ad damnum* clause in its pleading required the trial court to exclude all evidence on damages. This contention was decided adversely to defendant's position by *Hollopeter v. Palm,* 134 Or 546, 550, 291 P 380, 294 P 1056 (1930),

(Continued from page 56)

as a result of perceptible change in the river course, title to the surfaced land revests in its former owner * * *. The re-emergence doctrine has been accepted by a number of States * * *. Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land *identifiable as part of his original parcel.* In that sense, we have embraced the re-emergence concept." (Emphasis supplied.) 38 L Ed 2d at 541, n 28.

In the case at bar, no evidence was introduced to show that any portion of Government Lot 11 was above ordinary high water. To the extent that a portion of Lot 11 is now emerged or re-emerges in the future, title to that portion could return to the defendant. For possible limitations on this return of title, *see,* Annotation, 41 ALR 395 (1926). On the facts as presented, we need not settle that question now.

appeal dismissed 284 US 572 (1931), wherein the court concluded that the entire omission of the *ad damnum* clause was immaterial where, as here, after a cause of action is set out there is a prayer for a specified amount.

Defendant also argues that the court erred in denying its motion to exclude evidence from the case on damages which occurred after the filing of the complaint in the original case in June of 1965. Damages in ejectment proceedings are provided for by ORS 105.030, which statute specifically permits the recovery of damages from the date of the commencement of the action to the giving of a verdict.

The defendant next contends that the court erred in denying its motion to exclude evidence relating to quantities of gravel dredged from the river. Defendant claims that since the state has pleaded as the measure of damages the reasonable value of the use of the premises for each year or, as admitted by defendant, rental value, it cannot introduce proof as to amount of gravel removed since that does not relate to rent. However, it is noted in Newell on Ejectment, ch XIX, § 3, 606-07 (1892):

> "*Whatever* would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment. But these profits frequently include matters which would hardly be termed rent as between landlord and tenant * * *." (Emphasis supplied.)

Accord, Crane v. Oregon R. & N. Co., 66 Or 317, 328, 133 P 810 (1913). Mesne profits are defined as the rents and profits or the value of the use and occupation of the real property recovered in an action of ejectment for the period during which the property has been wrongfully withheld. Newell, supra, § 2.

There are numerous cases which find that royalty payments pursuant to a lease would constitute mesne profits or rent in an ejectment action. *See, United States Steel Corporation v. United States,* 270 F Supp 253, 259 (SD NY 1967), *aff'd* 445 F2d 520 (2d Cir 1971), *cert denied* 405 US 917 (1972); *Moragne v. Doe, ex dem. Moragne et al.,* 143 Ala 459, 39 So 161, 111 Am St R 52 (1904); *Barnard v. Jamison,* 78 Cal App2d 136, 177 P2d 341 (1947).

Finally, under ORS 274.530, when the state leases its submersible and submerged lands in navigable streams, the lease is not payable in a lump sum but only on the basis of a price per cubic yard or ton for the material removed. Under the statute, "rent" would be the same as "royalties" and these would be determined on the basis of the total amount of material removed from the river.

In sum, where, as conceded by defendant, the state pleaded lost rent as its damages in an ejectment action, it would be able to show the value of that lost rent through the use of royalties based upon the total amount of material removed from the river.

IV. Amount of Damages

Defendant contends that the court erred in allowing any damages to the state because such damages were speculative and also that the court erred in awarding any damages to the state for the removal of sand and gravel from Parcel 3 as there was no substantial evidence to support the same. The trial court

made the following determinations in regard to damages:

"1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding [sic] the filing of the original complaint herein until date, namely, from June 7, 1959, to date.

"2. Defendant is not entitled to an offset for 'avoidable consequences' or for failure to mitigate damages.

"3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of materials removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

"4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

"5. With respect to materials that were removed, the Court finds as follows:

"(a) 574,000 cubic yards of minerals were removed from Parcel 1.

"(b) 56,000 cubic yards of minerals were reremoved from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

"(c) No material was removed from Parcel 4.

"(d) 9,000 cubic yards of minerals were removed from Parcel 5.

"(e) 21,000 cubic yards of minerals were removed from Parcel 6.

"(f) No minerals were removed from Parcel 7.

"(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

"B. Conclusions of Law

"1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

"2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment."

The state's witness testified that the royalties for the material removed ranged from 10 cents per cubic yard to 15 cents per cubic yard in the period of time during which the material was removed. There is thus evidence to support the cubic yard royalty figure established by the court. To establish the amount of damages, the state first introduced evidence dealing with the amount of gravel removed by three independent contractors. Records of the amounts dredged by the Joe Bernert Towing Company were furnished by the defendant to the state's fiscal auditor at the Division of State Lands. These records indicated the number of cubic yards removed during each year of the period 1963-1968 (with the exception of 1966 wherein no material was removed by this independent contractor). Evidence was also introduced dealing with the amount removed by the Willamette Tug and Barge Company based on the number of buckets removed during a given period in 1960 and the average number of cubic yards removed per bucket. Finally, Mr. Alfred Millar testified that he had dredged approximately 40,000 cubic yards from the river. Proof as to location of material taken by the independent dredge operators was based on aerial photographs marked by the

witnesses as to locations of removal, and estimates of quantities removed between low watermarks in each parcel and between high water and low watermarks.

Proof was also introduced of the amounts of gravel taken by defendant with its own equipment and personnel. The defendant furnished the state its ledger records which had been prepared on a monthly basis for the period July 1, 1959, to December 31, 1970. Raw production totals of materials were shown from the year 1959 through 1970. The state then estimated that at least 50 percent of the amount of the raw materials production came from the riverbed. Adequate evidence was introduced to support this 50 percent figure.

Combining the figures introduced, the following totals were obtained: Parcel 1: 757,588.3 cubic yards (the trial court found 574,000 cubic yards had been removed); Parcels 2A, 2B and 2C: 104,964.9 cubic yards (the trial court awarded these parcels to the defendant); Parcel 3: 120,468.6 cubic yards (the trial court found that 56,000 cubic yards had been taken out prior to July of 1963); Parcel 5: 11,506.4 cubic yards (the trial court found 9,000 cubic yards had been removed); Parcel 6: 26,427.1 cubic yards (the trial court found that 21,000 cubic yards had been removed).

There is evidence to support the trial court's finding in regard to Parcels 1, 5 and 6.

There is a substantial question raised with regard to Parcel 3. While the evidence introduced by the state showed that over 120,000 cubic yards had been removed, the state makes no claim for these amounts since they relate to material taken subsequent to July 1, 1963,

and thus were covered by the lease between the parties. The state, however, argues that the trial court's award of 56,000 cubic yards should be affirmed on the basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest as part of its damages.[9]

The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land,

---

[9] Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"* * * * *

"(b) Judgments and decree for the payment of money from the date of the entry thereof unless some other date is specified therein * * *."

such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in *Meyer v. Harvey Aluminum,* 263 Or 487, 501 P2d 795 (1972), that interest is not allowable on unliquidated damages. Damages are unliquidated

> "* * * where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In *Rose City Transit v. City of Portland,* 99 Adv Sh 1187, — Or App ——, — P2d — (1974), we allowed interest from the date of the taking of the property in question. However, in *Rose City,* unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. *See, Medak v. Hekimian,* 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to

take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and other physical evidence from which he obtained such facts forming the basis of his opinion. Argument on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting data and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party * * * and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken * * * or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *." ORS 45.181.

It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. *Richardson-Merrell, Inc. v. Main,* 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and, thus, by implication the Oregon

rules, the granting or denial of a protective order is within the discretion of the trial court. *See,* 8 Wright and Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F2d 1204 (8th Cir 1973). In the absence of a transcript of the oral argument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. *Wood et ux v. Baker et ux,* 217 Or 279, 284, 341 P2d 134 (1959). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause of action is stated in 1 Bancroft, supra at 586-87:

> "• • • If the rule were otherwise, one could split his demand into innumerable parts, thereby multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in *Coos Bay Oyster Coop. v. Highway Com.,* 219 Or 588, 348 P2d 39 (1959), cited by defendant, the court notes that:

> "• • • Allowance of separate actions for fractional claims would inevitably result in the pyramiding, duplicating and overlapping of damage items to the detriment of the condemnor • • •." 219 Or at 594.

Defendant contends that the state's splitting of its case into 11 separate claims made the case unduly complicated, and was done solely for the convenience of the state's expert witness. Applying the policy reasons for avoiding the splitting of a cause of action to the facts of this case, it becomes clear that none of the hazards sought to be protected against were present here. First, all of these causes of action were presented in a single complaint, so there was no danger of the defendant's being harassed by a multiplicity of suits. At the conclusion of the lawsuit, the limits of the property in question, its ownership, and damages, would be determined. As the court noted in *Wood et ux v. Baker et ux,* supra at 285, where there is no question of a multiplicity of suits there is no violation of the rule against splitting a cause of action. Second, splitting of the one parcel into 11 separate parcels reflects more nearly the various geographical differences and historical origins of the parcels involved. Rather than harassing the defendant, such splitting would make it

easier for the factual differences between the parties to be settled.

While *Coos Bay Oyster Coop. v. Highway Com.*, supra, cited by defendant, does support the proposition that interests in land cannot be split into fractional claims, that case involved the attempt to split one interest in real property into several subinterests; this was not the result here. Also, *Coos Bay* must be evaluated in light of the policy determinants behind the prohibition of a splitting of the cause of action. Viewed in this light, we do not find the splitting of the land in question into 11 separate parcels, each the subject of a cause of action, to be improper.

VIII. Prescriptive Rights

The defendant alleges that the company had, continuously since 1920, conducted sand and gravel removal operations from the disputed portions of the Willamette River, which removal had been open, continuous, notorious, hostile, exclusive and adverse to the state, and had been known to the state since 1933. The defendant contends that this removal results in the defendant's acquiring an irrevocable property right to remove sand and gravel from the disputed property. The defendant contends that this property right is one of prescription.

There is some authority that a state may lose rights to property through prescription. As noted in 1 Farnham, Waters and Water Rights 225, § 45b:

> "Where the land under tide water may be granted by the state, no reason exists why a private individual cannot establish title under the theory of lost grant. • • • [R]ecords may become lost,

> and it is unreasonable to require the original grant to be produced in all cases. Therefore the presumption of grant may be raised by long possession accompanied by acts of ownership • • •."

However, it is important to note that this prescriptive right is limited:

> "• • • If the law prohibits the grant of the tide land, no title can be acquired by adverse possession, since no grant can be presumed • • •." 1 Farnham, supra at 226.

Between 1878 and 1963, there was no statutory provision by which the state could grant title to any nontidal portion of the Willamette River. *See, State v. McVey,* supra; *Corvallis Sand & Gravel v. Land Board,* supra. The authority of the state to grant title to submerged and submersible lands in the Willamette River in the Corvallis area arose after 1963. Since the state has been actively contesting defendant's possession of these parcels since 1958, it is impossible for defendant to contend that there has been a "lost grant" prior to 1963. No prescriptive rights arose against the state.

IX.

Defendant raises several assignments of error which need only brief mention. First, it contends that ejectment will not lie to recover the possession of land under water. This question has, by implication, been decided adversely to defendant's claim in *Corvallis Sand & Gravel v. Land Board,* supra. *See also, Lowndes v. Huntington,* 153 US 1, 14 S Ct 758, 38 L Ed 615 (1894); *Bates v. Illinois Central Railroad Company,* 66 US (1 Black) 204, 17 L Ed 158 (1861).

Defendant's argument that estoppel and acquiescence in the trespass should apply against the state in

this case was also decided adversely to defendant's position in *Corvallis Sand & Gravel Co. v. Land Board,* supra, 250 Or at 328-29. The same policy considerations that militated against the allowance of the defense of laches in that case apply alike to the defense of estoppel and acquiescence.

Defendant's argument that the statute of limitations applies is without support. ORS 12.250.[6]

Finally, defendant raises certain constitutional challenges to both the ejectment statutes, ORS 105.005, et seq, and the ejectment proceeding as a whole. Both of these points could have been raised in the earlier challenge to the proceeding in *Corvallis Sand & Gravel Co. v. Land Board,* supra, but were not. Even assuming that these arguments are meritorious, defendant is foreclosed from raising them now.

In sum, we affirm the judgment of the trial court in all respects with the exception of the award of damages for Parcel 3, which award we reverse.

Affirmed in part; reversed in part.

---

[6] "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit." ORS 12.250.

APPENDIX G

MEMORANDUM OPINION OF BENTON COUNTY CIRCUIT COURT

No. 21512—May 25, 1972

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512 MEMORANDUM OPINION

This action was tried before the Court without jury on October 11, 1972. Leave was given each party to file proposed findings and written argument in lieu of closing arguments. The Court has considered the written materials submitted by the respective parties and has reviewed the evidence, and briefs submitted. The Court now finds as follows:

1. Defendant's Motion heard and argued on May 12, 1972, asking the Court to reconsider its previous rulings on pleadings is denied.

2. The State of Oregon acquired title to all lands within its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. Private ownership of the lands lying between the

high and low water marks oi the Willamette River, must therefore be by grant from the State of Oregon. This acquisition of title by the State was by virtue of the State's soverignity [sic]. These lands cannot be sold, or otherwise disposed of, by the State so as to prevent their use by the public of the navigable waters for navigation and fishing. *Corvallis Sand and Gravel Company vs. Land Board* 250 Or 319, 333.

The ownership if any of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title. *State v. McVey,* 168 Or 337 345.

The Defendant did not acquire title by adverse possession or laches against the State. *Corvallis Sand and Gravel vs. Land Board,* supra. The evidence does not establish title to the lands by conveyance from the State.

The Defendant claims title to some of the lands under the Laws of 1874, p. 76, Sec. 1, which provided that title of the State to tide and overflow lands upon the Willamette River was granted to the owners of the adjacent lands. The act was repealed effective October 18, 1878. "Owners" as used in this statute refers to the grantees of the United States and their successors in interest. The 1874 statute did not grant or confirm title in the United States government to any parts of the beds of navigable waters in the State. *State v. McVey* Supra, 356.

Defendant's predecessor in title, entered upon Gov-

ernment Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He was entitled to a patent on July 8, 1880. The patent was received April 10, 1882. Defendant's predecessor in interest did not become an "owner" within the meaning of the 1874 statute before its repeal in 1878, nor did his patent convey to him any parts of the bed of the Willamette River.

Parcel 1

Defendant makes no claim to that portion of Parcel 1 which is located from the line described in "number one" on page 11 of Defendant's third amended answer. The line starts at the approximate southwest corner of Lot 10.

Prior to removal by dredging of large quantities of rock and gravel by a railroad in 1913, a large portion of what is described as Parcel 1 consisted of a formation known as Avery Bar. The Defendant alleges that Avery Bar was a point bar accretion to lands of which he is the grantee, to-wit, government Lots 10 and 11. The Court finds that this portion of the bed of the Willamette River is not a part of the Fischer Cut hereinafter to be discussed. The Court further finds that although Avery Bar originated as an island, it subsequently, but prior to 1913 by accretion became a point bar joined to the uplands. The Court finds that the accretion first joined the uplands at the ordinary low water mark, and that

the point bar then developed on top of the joinder. The State owned from the ordinary high water mark to the ordinary low water mark. The point bar, known as Avery's Bar accreted to land owned by the State. Parcel 1 therefore belongs to the Plaintiff.

Parcel 2 A, B, and C

The Court finds that the Willamette River was clearly coursing around Fischer Island, a peninsula-like formation, from 1853 to 1909. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed.

After a record flood on November 25, 1909, the Willamette River visibly changed its course from around Fischer Island to across its neck through Fischer Cut. In 1906 prior to the "break through" it was estimated that roughly one quarter of the flow of the river was carried through Fischer Cut which was dry at low water, or below the 5 foot stage, and carried only at intermediate or high stages of the river. In 1890, Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut channel in 1906 was in practically the same location as it was in 1890.

During the period intervening 1890-1909 the high water overflow did not clear Fischer Cut and the river continued to flow around Fischers Island. The event

when the Willamette River broke through Fischer Cut during the flood of November 25, 1909, was an event of common community discussion and the complete change of course shortly after its occurrence was observed by creditable witnesses including retired Circuit Judge Fred McHenry. The final action of the river was sudden and of such great force and violence as to convert Fischer Cut into the main channel of the Willamette River.

The change in course was not gradual and imperceptible as would occur in accretion or reliction. This was a sudden, rapid, and violent change of course, avulsive in character. The Court finds that the change of the course of the Willamette River from around Fischer's Island to through Fischer's Cut was an avulsive change, and that Parcels 2A, 2B, and 2C are owned by defendant.

Parcel 3

The Court finds that the portion of Parcel 3 downstream from the confluence of East River (prior to 1909, the Willamette River), which courses in part around Fischer Island, as measured by a line extended from the low water mark of the confluence extended across the Willamette River, lies within the bed of the Willamette River, and that the River has coursed over this portion in substantially the same manner since 1853. The Court finds that this portion of Parcel 3 is owned by Plaintiff. Parcel 3 is a part of Lots 11 and 12, Section 1, which was

the subject of a patent prior to 1878. Defendant's predecessor in title under the 1874 Act was owner to the low water mark of the Willamette River as it coursed around Fischer's Island. That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River in now named East River. Defendant therefore is owner of that portion of Fischer Cut upstream from the confluence of East River below, or upstream, as measured by a line extended from the low water mark of the confluence extended across the Willamette River. The remainder of Parcel 3 is owned by the Plaintiff.

Parcel 4

The Court finds that a substantial part of Parcel 4 now under water was in the bed of the river below the low water marks prior to the construction of a wingdike in 1948. This accreted formation, whether it be an island or point bar joined to the upland, was formed upon the bed, or accreted and joined the upland beginning at the low water mark. In either event it became a part of the land owned by Plaintiff, that is, the bed of the river between high and low water marks. Thus it is not material to ownership whether the accreted mass became covered with water from whatsoever cause be it the wingdike or the dredging of Avery Bar by the railroad in 1913-14.

Parcel 5

The Court finds that Parcel 5 is in the bed of the River between the lines of high and low water and that the Defendant's predecessors in title acquired no right therein by the Act of 1874. Parcel 5 is owned by Plaintiff, to the extent that it lies below the high water mark.

Parcels 6 and 7

The Defendant's predecessors in title of Parcels 6 and 7 acquired no right therein by the Act of 1874. Further the Court finds that Parcels 6 and 7 are not within the avulsive channel of Fischer Cut. The ownership of Parcels 6 and 7, including Avery Bar, or the railroad bar, within the lines of high and low water is in the Plaintiff.

Parcel 8

The Court finds Parcel 8 to be a point bar, joined to the uplands above the low water mark, and that the uplands were patented during the effective period of the 1874 statute. The Court finds Defendant to be the owner of Parcel 8.

Parcel 9

Defendant makes no claim to Parcel 9.

HIGH AND LOW WATER MARK

The Court finds that the ordinary low water mark at the guage at the City of Corvallis Water Treatment Plant is 197.4 feet above mean sea level, and from this point downstream, the ordinary low water mark drops an average of .9 feet every one-quarter of a mile.

The Court finds that the ordinary high water mark beginning at the location of the guage of the Corvallis Water Treatment Plant is 207.4 feet above mean sea level and from this point downstream, the ordinary high water mark drops an average of .9 feet every one-quarter of a mile.

DAMAGES

The Court finds as follows:

1. Plaintiff is entitled to recover damages for the period of six years immediately preceding the filing of the original complaint herein, and to date.

2. The Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

The Court finds as follows:

1. 574,000 cubic yards of minerals were removed from Parcel 1; 56,000 from Parcel 3, in addition to that covered by the lease; no material from Parcel 4; 9,000 from Parcel 5; 21,000 from Parcel 6; none from Parcel 7, for a grand total of 660,000 cubic yards.

2. That the Plaintiff is entitled to recover damages of a total of $82,500.

3. The Court finds that the damages are unliqui-

dated and that Plaintiff is entitled to interest only from date of judgment.

Plaintiff may submit findings of facts and conclusions of law accordingly.

Dated this 25th day of May, 1972.

RICHARD MENGLER
Circuit Judge

APPENDIX H

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUPPLEMENT TO COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, v. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512 FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

A. **Finding of Fact**

The Willamette River was a navigable river at the time of Oregon's admission into the Union in 1859, and is now navigable, in that section of the river between its confluence with the Mary's River and upstream to the present site of the City of Corvallis Water Treatment Plant.

B. **Conclusions of Law**

The State of Oregon acquired title to all lands with-

in its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. This acquisition of title by the State was by virtue of the State's sovereignty. Private ownership of the lands lying between the high and low water marks of the Willamette River, must therefore be by grant from the State of Oregon. These lands cannot be sold or otherwise disposed of by the State so as to prevent their use by the public of the navigable waters for navigation and fishing.

The ownership, if any, of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title.

II.

A. **Finding of Fact**

Defendant did not acquire title to any of the property in dispute by a conveyance from the State of Oregon.

B. **Conclusion of Law**

The defendant could not acquire title as against the State of Oregon to any of the property in dispute by adverse possession or laches.

III.

A. **Finding of Fact**

Defendant's predecessor in title entered upon Government Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He became entitled to a patent from the United States on July 8, 1880. The patent was received April 10, 1882.

B. **Conclusion of Law**

Defendant's predecessor in interest did not become an "owner" of Government Lots 9, 10 and 12 within the meaning of laws 1874, p. 76, prior to the repeal of such law on October 18, 1878, by laws 1878, pp. 54-55, nor did his patent convey to him any part of the bed of the Willamette River.

IV.

A. **Finding of Fact**

1. Ordinary Low Water Mark

(a) The elevation of ordinary low water mark is 197.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream, the ordinary low water mark drops an average of 0.9 feet every one-quarter of a mile.

2. Ordinary High Water Mark

(a) The elevation of the ordinary high water mark is 207.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream, the ordinary high water mark drops an average of 0.9 feet every one-quarter of a mile.

V.

Parcel 1

A. **Findings of Fact**

1. Parcel 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant and its downstream limits coinciding with the upstream limits of Parcel 2A.

2. Defendant disclaims any interest in that portion of Parcel 1 upstream of a line commencing at the approximate southwest corner of Lot 10.

3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10.

7. Thereafter, a point bar developed on top of the joinder.

8. Thereafter, the railroad in 1913 removed most

of the bar by dredging large quantities of rock and gravel.

9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10.

10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914.

B. **Conclusion of Law**

Plaintiff owns Parcel 1.

VI.

Parcels 2A, 2B, and 2C

A. **Findings of Fact**

1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer

Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut.

B. **Conclusion of Law**

Defendant owns Parcel 2A, 2B and 2C.

VII.

Parcel 3

A. **Findings of Fact**

1. Portion of Parcel 3 below confluence of East River.

(a) Parcel 3 lies in the bed of the river between ordinary low water marks.

(b) The portion of Parcel 3 downstream from a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) extended across the Willamette River, lies within the bed of the River over which the river has coursed in substantially the same manner since 1853.

2. Portion of Parcel 3 upstream of confluence of East River.

(a) This portion of Parcel 3 is a part of government lots 11 and 12, Section 1, which lots were patented prior to 1878.

(b) Defendant's predecessor in title under the laws of 1874, p. 76, owned to the low water mark of the Willamette River as it coursed around Fischer's Island.

(c) That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River is now named East River.

B. **Conclusion of Law**

1. Plaintiff is the owner of that portion of Parcel 3 below the confluence of East River as delineated by a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) across the Willamette River.

2. Defendant is the owner of that portion of Parcel 3 upstream from the line extended from the low water mark of the left bank of East River across the Willamette River.

VIII.

Parcel 4

A. **Findings of Fact**

1. Parcel 4 is an accreted formation lying on the right bank of the Willamette River just downstream from the City of Corvallis Water intake structure. The riverward boundary of this parcel is the ordinary low water line as defined by the court. The landward boundary line is the ordinary low water line as it existed around a portion of this parcel in July of 1969 and extended around the remainder.

2. A substantial part of Parcel 4 was in the bed of the river below low water marks prior to the construction of a wingdike by the Army Corps of Engineers in 1948.

3. This accreted formation originated in the river bed as either an island or a point bar, below the lines of ordinary low water.

4. This accreted formation rose from the bed and joined the upland at low water marks along the right bank.

5. The accretion was the direct result of the construction by the Corps of Engineers of a wingdike in 1948 which was placed on the island or point bar prior to its joinder to the upland.

6. Since the accretion originated from the state

owned bed below the lines of ordinary low water, it belonged to the state.

B. **Conclusion of Law**

Plaintiff owns Parcel 4.

IX.

Parcel 5

A. **Findings of Fact**

1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.

2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76.

B. **Conclusion of Law**

Plaintiff owns that portion of Parcel 5 which lies below the ordinary high water mark.

X.

Parcel 6

A. **Findings of Fact**

1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 6 is not within the avulsive channel of Fischer Cut.

3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 6, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

XI.

Parcel 7

A. **Findings of Fact**

1. Parcel 7 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 7 is not within the avulsive channel of Fischer Cut.

3. A portion of Parcel 7 occupies submersible lands in front of government lot 12 of section 12. The remaining portion of Parcel 7 was not riparian prior to the repeal of laws of 1874, page 76, by laws of 1878, pages 54-55.

4. Therefore, defendant's predecessors in title acquired no right therein by virtue of the laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 7, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

Parcel 8

A. **Findings of Fact**

1. Parcel 8 was a point bar, joined to the uplands above the low water mark.

2. The uplands were patented during the effective period of laws, 1874, p. 76.

B. **Conclusion of Law**

Parcel 8 belongs to the defendant.

Parcel 9

A. **Findings of Fact**

1. Defendant disclaims any interest in Parcel 9.

2. Parcel 9 presently lies within the bed of the river between the lines of ordinary high and low water marks as determined by the court.

B. **Conclusion of Law**

Plaintiff, as against the defendant, owns Parcel 9.

XII.

Damages

A. **Findings of Fact**

1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding the filing of the original complaint herein until to date, namely, from June 7, 1959, to date.

2. Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total

amount of minerals taken within the low-high water boundaries established by this Court.

5. With respect to materials that were removed, the Court finds as follows:

(a) 574,000 cubic yards of minerals were removed from Parcel 1.

(b) 56,000 cubic yards of minerals were removed from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

(c) No material was removed from Parcel 4.

(d) 9,000 cubic yards of minerals were removed from Parcel 5.

(e) 21,000 cubic yards of minerals were removed from Parcel 6.

(f) No minerals were removed from Parcel 7.

(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

B. **Conclusions of Law**

1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment.

Dated this 19th day of June, 1972.

/s/ RICHARD MENGLER
Circuit Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	)	No. 21512 Supplement to Court's Findings of Fact and Conclusions of Law

WHEREAS, on June 19, 1972, the Court entered its Findings of Fact and Conclusions of Law; and

WHEREAS, the parties filed objection thereto and requested other and different findings; and

WHEREAS, the plaintiff was to submit detailed property descriptions as part of the Court's findings by way of Supplement thereto,

NOW, THEREFORE, the Court does hereby enter its Supplement to its Findings of Fact as follows:

1. Findings of Fact IV A. 2.(a), Page 3, Line 7 is amended to read, "207.7".

2. Findings of Fact VI A. 3., Page 4, Line 27, is amended by deleting, "possibly".

3. Findings of Fact X, Page 8, is amended by adding the following additional finding after Line 10, Page 8:

> "4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11."

4. A legal description of each of the parcels involved in this litigation, as amended by the Court's Findings of Fact and Conclusions of Law and the within Supplement thereto, is annexed hereto as Exhibits A through K and made a part hereof by reference.

Dated this 28th day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

APPENDIX I

COPY OF JUDGMENT OF
BENTON COUNTY CIRCUIT COURT
No. 21512
(Parcel Legal Descriptions omitted)

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff,	)	No. 21512
vs.	)	
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	JUDGMENT

The above entitled matter having come on regularly for trial before the Court without a jury; plaintiff appearing through its attorneys Lee Johnson, Attorney General; by Peter S. Herman, Senior Counsel; and Philip J. Engelgau, Assistant Attorney General; defendant appearing through its president, John H. Gallagher, and through its attorneys, Robert Mix and George Mead; and the Court having considered the evidence of the parties and the arguments of counsel and having heretofore denied defendant's motion to reconsider the Court's previous rulings on the pleadings, and the Court having entered its Findings of Fact and Conclusions of Law and its Supplement thereto;

NOW, THEREFORE, the Court does hereby order and adjudge as follows:

I.

Defendant's motion asking the Court to reconsider its previous rulings on the pleadings is denied.

II.

Parcel 1

Plaintiff is the owner in fee simple of Parcel 1, and is entitled to the immediate possession thereof; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 1 is annexed hereto as Exhibit A and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Seventy-One Thousand Seven Hundred Fifty Dollars ($71,750.00) as damages for the wrongful withholding of possession of Parcel 1 by the defendant from July 1, 1959, to the date of this Judgment.

III.

Parcels 2A, 2B and 2C

Defendant is the owner in fee simple and entitled to the possession of Parcels 2A, 2B and 2C. A legal description of Parcels 2A, 2B and 2C is annexed hereto as Exhibits B, C and D, respectively, and made a part hereof.

IV.

Parcel 3

Plaintiff is the owner in fee simple of Parcel 3 and was entitled to the immediate possession of said parcel prior to July 1, 1963, the beginning date of the ten year lease between the parties covering said parcel. A legal description of said parcel is annexed hereto as Exhibit E and made a part hereof.

It is THEREFORE ORDERED that Plaintiff do have and recover from the defendant the sum of Seven Thousand Dollars ($7,000.00) as damages for the wrongful withholding of possession of said parcel by the defendant on and between July 1, 1959, and July 1, 1963.

V.

Parcel 4

Plaintiff is the owner in fee simple of Parcel 4 and is entitled to the immediate possession of said parcel; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 4 is annexed hereto as Exhibit F and made a part hereof.

VI.

Parcel 5

Plaintiff is the owner in fee simple of Parcel 5 and entitled to the immediate possession of Parcel 5; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 5 is annexed hereto as Exhibit G and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant, the sum of One Thousand One Hundred Twenty-Five Dollars ($1,125.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VII.

Parcel 6

Plaintiff is the owner in fee simple of Parcel 6 and is entitled to the immediate possession of Parcel 6; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 6 is annexed hereto as Exhibit H and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Two Thousand Six Hundred Twenty-Five Dollars ($2,625.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VIII.

Parcel 7

Plaintiff is the owner in fee simple of Parcel 7 and is entitled to the immediate possession of Parcel 7; it is

THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 7 is annexed hereto as Exhibit I and made a part hereof.

IX.

Parcel 8

Defendant is the owner in fee simple and entitled to the possession of Parcel 8. A legal description of Parcel 8 is annexed hereto as Exhibit J and made a part hereof.

X.

Parcel 9

Plaintiff is the owner in fee simple of Parcel 9 and is entitled to the immediate possession of Parcel 9; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. Defendant disclaims any interest in said parcel. A legal description of said parcel is annexed hereto as Exhibit K and made a part hereof.

Based on the above items of damages awarded plaintiff, it is ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the grand total of Eighty-Two Thousand Five Hundred Dollars ($82,500.00) and its costs and disbursements herein incurred which are taxed in the sum of $371.50.

Dated this 28th day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

APPENDIX J

COPY OF EXH 110-A, U.S. CORPS OF ENGINEERS LETTER OF JANUARY 10, 1906

U.W&Y.

UNITED STATES ENGINEER OFFICE

321 Custom House

P.O. Drawer 50 Portland, Oregon

January 10, 1906.

Major S. W. Roessler,
Corps of Engineers, U. S. Army,
Portland, Oregon.

Major:

In accordance with your instructions, on January 4th, I made examination of the Willamette River in the vicinity of Corvallis and found a substantial fraction of the river flowing through the high water "cut off" channel above the City as reported in Mr. August W. Fisher's recent letters to this office. It is roughly estimated that about one quarter of the flow of the river is carried by this channel.

The channel in question is across the neck of a peninsula and is some 3,200 feet long, while the distance around by the main river is two and one quarter miles.

This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to

its foot is noted as about 8 feet. The approximate present location of the channel is shown in dotted lines on the sketch herewith.

The river was at a 4 foot stage at the time of my examination and the banks along this new channel showed indication of recent caving, particularly towards its lower end. The land at the foot of the channel and along the west bank of the Willamette to the mouth of Mary's River is owned by the Corvallis Flouring Mills, and Mr. Fisher, who is the executor and Manager of these mills is naturally apprehensive of injury to his property as well as to navigation and is therefore desirous that the United States make an effort to prevent the development of this new channel.

It is a question whether this channel will increase greatly during high water and even should it do so, whether any actual injury to navigation would result, for the reason that boats use the river above Corvallis very little and then only during high stages, at which time there would be ample depth in the river notwithstanding the "cut off".

It is estimated that a closing dam at the head of this "cut off" of piles, brush and stone, with necessary shore protection at each end, would have to be from 800 to 1,000 feet in length and would cost several thousand dollars if constructed under favorable low water

conditions, and as the interests of navigation do not at present seem imperilled the expenditure seems not justifiable.

This was explained to Mr. Fisher, who visited the "cut off" with me, and he was asked to keep this office informed of any change in the conditions and he was given permission to keep the cut free from lodging trees at its lower end for the purpose of preventing further scour of his land,—and this seemed satisfactory to him.

It is recommended that a further examination of the "cut off" be made at the close of the high water season next spring.

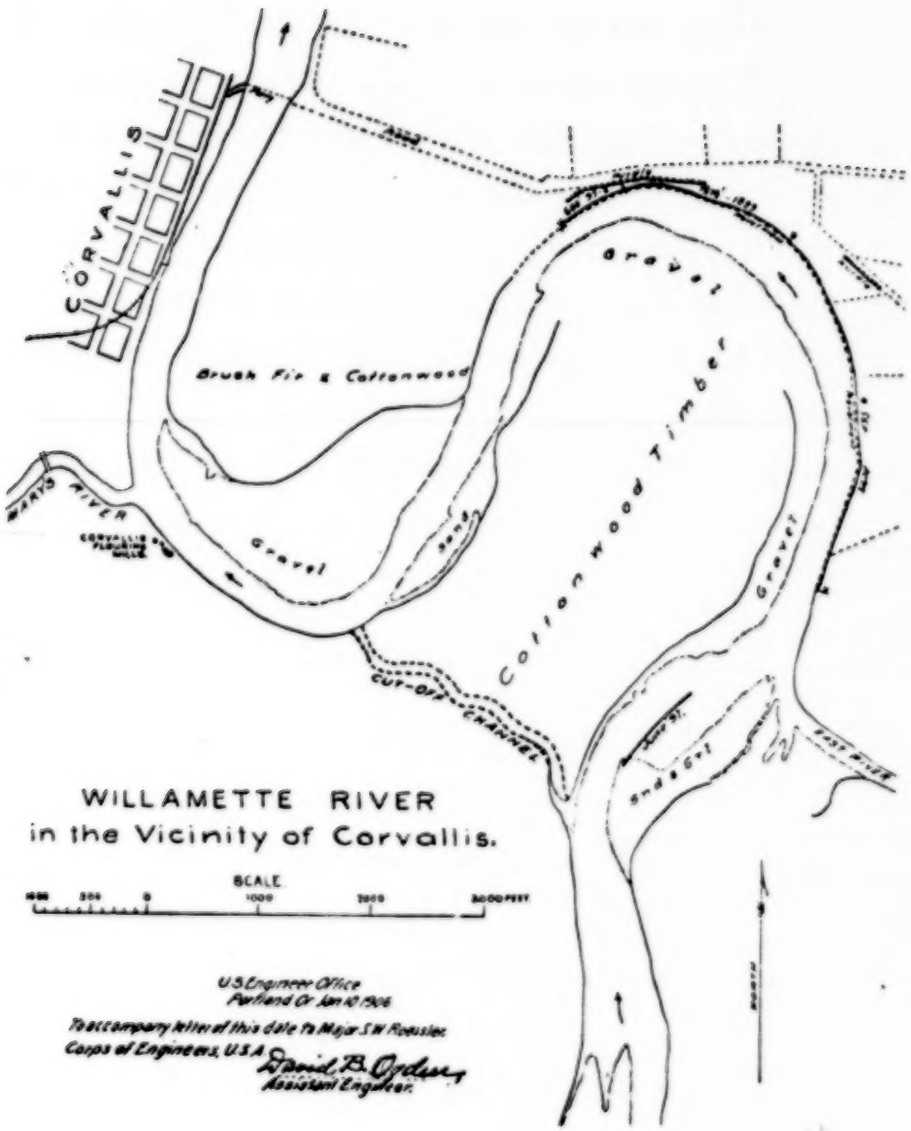
While at Corvallis I also made examination of the mile or more of revetment above the City formerly constructed by the United States and found it to be in good condition.

Very respectfully,

DAVID B. OGDEN

Asst. Engineer.

1 Inclosure.



APPENDIX K

TESTIMONY OF FRED S. FISCHER

(Transcript pp 389 to 405)

FRED S. FISCHER, being called as a witness, was first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Herman:

Q Can you hear me all right, Mr. Fischer?
A Yes, I'm all right.
Q Would you state your full name for the record, please?
A Huh?
Q Would you state your full name for the record?
A Huh?
Q State your name.
A Oh, Fred S. Fischer.
Q And you reside here in Corvallis?
A Born here, yes.
Q When were you born, Mr. Fischer?
A December 29, 1881.
Q And you have lived here all your life?
A Yes, practically all my—a little time I was at college away from town, but this is my home. I was in Portland for probably six or seven months, went to business college there.

Q Mr. Fischer, I'm going to have you handed Exhibit 15 which is an aerial photograph.

A Yes, this is Seavy hop yard and this is the Crystal Lake.

Q That's correct.

A And cemetery is here and hop dryers are here, that's right, and the gravel bunkers is at the mouth of this cut and our flour mill was right here.

Q You are pointing where the arrow is and right next to the word "mill," that was the Fischer flour mill?

A Yes, that was the Fischer flour mill and Marys River come in there, doesn't it?

Q That's correct.

A And our home was right—right about there, that's where I was born.

Q Right near to the mill?

A Yes, just—

Q Do you recognize this over there across the river?

A Oh, yes, yes.

Q Fischer Island?

A Fischer Island, yes. That should be a "C" in there but then it's S-C-H, it's German.

Q All right. Now, Mr. Fischer, did you used to play in the area of Fischer Island when you were a boy?

A Yes, yeah, all the young fellows, oh, around 12, 13, 14 years, we used to hunt in there for rabbits.

Q I see.

A And my brother used to shoot China pheasants over there too because I was too young to use a gun at that time.

Q All right. Did the river used to go around Fischer Island?

A No.

Q How did the river used to go?

A Well, now let's see. This is the new channel, huh?

Q Yes.

A And this is—what is this here?

Q I think that is the old East River.

A East River, and what—you want to know now is where it broke through?

Q That's right, I am interested in this gully I think you described in your deposition.

A Uh-huh.

Q Some weeks ago.

A Yes. And this here is about, oh, I would judge two and a half to three miles around there.

Q You are talking about Fischer Island?

A Yes, and this here cut here is probably three-quarters of a mile, half to three-quarters of a mile.

Q Is that what you call Fischer Cut?

A Yes, I call that the Fischer Cut and then that draw was right in through here.

Q Do we have—

A It was—

Q —a crayon, Mr. McReary? Do you want to mark where the draw was, Mr. Fischer?

A Well, if I can locate myself now, this is—what is that?

Q Well, that is an island in 1932—or 1936, Mr. Fischer.

A Oh.

Q That is upstream from Fischer Island, of course.

A Yeah, well now, let's see. Was this Marys River—no.

Q No, that's where the East River meets the Willamette River, the Marys River is down here.

A Oh, I see. This is the East River?

Q That's correct.

A East River, and you want to know—

Q The approximate location of this cut or gully.

A It would be right in through there.

Q Do you want to make a series of crosses?

A Well, now let's see if I understand it right. What does this white represent?

Q Well, I think that's gravel.

A Gravel.

Q Or silt, Mr. Fischer.
A Uh-huh.
Q Remember, this is a 1936 photograph.
A Uh-huh. Well, it would be right in through there, it extended and this area is what?
Q Well, that is just part, that is just upstream, Mr. Fischer.
A Uh-huh. Well, this is all dry land now, isn't it?
Q Yes.
A Yeah. Well, let's see now, and you want to know where—
Q Well, let's stop there a minute, Mr. Fischer. You have marked three crosses, did you used to play in that area as a boy?
A Yes.
Q What was it, was it a gully?
A Yes, probably 25 feet wide and probably five or six—maybe, oh, seven—between six and eight feet deep.
Q I see.
A Just like that.
Q When would there be water in this gully?
A During the winter rainy season.
Q Would there be any water there in the summertime?
A In certain places where it washed out more, you see, that soil was just sandy soil and it washed down every high water.
Q There was sandy soil in the gully?
A Well, down—well, I'd say the hard pan was the bottom of it, but above that was sandy soil, it washed, the floods washed all the sandy soil out.
Q Was there a gully there as long as you can remember?
A Oh, yes, as I told you once before, the Lord Almighty made it.

Q So it was there when you were a boy?
A Oh, yes, yes.
Q How old do you think you were when you remember it there as a boy?
A Oh, probably eight-nine years old.
Q I see.
A Whenever Mother let me go.
Q I see. Now, you say there was water through that area in the wintertime?
A Oh, yes.
Q What about in the spring?
A The whole island sometimes was covered.
Q Was it overflowed?
A With the extreme high water.
Q I see. Did this gully enlarge during the years?
A Oh, yes it kept going in all the time now.
Q When you say it kept going in—
A Going, going east.
Q You mean moving toward Fischer Island?
A Yes, taking soil away from us.
Q I see.
A Probably as much as, oh, that area, I should judge we lost probably through that Fischer Cut probably 60 acres.
Q You mean the water eroded this away?
A Yeah, in time, oh, a period of five years anyway.
Q I see.
A Before it broke through and it kept gradually —gradually and finally the steamboat used to go around here.
Q Around Fischer Island?
A Yes. Now, the Hogue Creek, where is that, that is up in here, isn't it?
Q Maybe you can point it out, Bob.
MR. MIX: Yes, Mr. Fischer, this is where

Hogue Creek comes into the Willamette right here, sir.

A Yeah, yeah. Is Kiger Island over here?

Q This is Kiger Island and this is Booneville up in here.

A Yeah, we had a warehouse at Booneville years and years ago, that was about, oh, about '99, I should say, the Benton Mill, we bought the Benton Mill from the Avery and Gibson Company.

Q I see.

A There was competition between my father and them.

Q I see.

A So he finally bought the town mill, what I call the town mill, and put me in charge in there about 1903 and I was there until the highway bought the First Street property.

Q I see. Mr. Fischer—excuse me.

A Yes, all right.

Q Was there any water in this Fischer Cut during lower stages of the river?

A Very little, just in places where there was washed out a little more than ever.

Q I see.

A And let's see, they—the boys used to haul gravel, those fellows are all gone now, Lamerson and all that bunch with teams, you see, they hauled gravel and had to go through this cut or this draw and it was quite a pull when they had a yard of gravel or sand up this hill, and then there was another big hill right in here at the end of where Gallagher's land ends now.

Q I see. Was the upstream end of the gully higher than the downstream?

A Oh, certainly, certainly, it wouldn't flow if it didn't, yes, it was just a gradual—gradual grade through there, you see.

Q And it was a gradual process that the river eroded away this gully then finally broke through?

A Well, I think the gravel mostly come from up in here.

Q Gradual process, I said?

A Yes, that's right, and it filled in and filled in and finally we had—well, let's see, the gravel bunkers would be this way, wouldn't it. We have had what we call a dead-man over in here for the anchor for the cable that we drawed the gravel from here up into the bunkers.

Q You mean where East River meets the Willamette you hauled gravel across the river or dug it?

A No, this isn't East River, this is the river that comes around Fischer Island.

Q Fischer Island?

A Yeah, that's right, and that's the gravel, the dead-man would be just about—about there.

Q Why don't you put a "D" there, Mr. Fischer.

A All right. Our home would be about there where I was born.

MR. MIX: Yes, that's by the mill, wasn't it, Mr. Fischer?

WITNESS: Just this side of the mill.

MR. MIX: Yes.

WITNESS: In fact, we had a long storage place reach pert near to the house, but in years back it was, oh, that warehouse was probably a hundred feet long and two stories and we stored the flour and mill feed in there.

MR. MIX: I see.

WITNESS: An then they had doors at different places where the trucks could load or mostly wagons then.

Q Do you know when the river finally broke through, Mr. Fischer, and you mentioned to me yes-

terday that your brother sold the gravel bunkers and I think it was in —

A 1909.

Q 1909?

A Yeah, and Gallagher, you see, he started it in about 1909, then he sold to Gallagher in about '11.

Q I see. Had the river broken all the way through by then?

A By the time — oh, yes, that's the reason he built the bunkers because all that gravel from up in here.

Q From upstream?

A Yes, just kept—the winter floods would carry that gravel just like that. (Waving hands)

Q Carrying it into Fischer Cut?

A Through the Fischer Cut, yes.

Q I see.

MR. HERMAN: I think that's all, Your Honor on direct.

CROSS-EXAMINATION

By Mr. Mix:

Q Mr. Fischer, did your father own the land?

A Yeah.

Q Where the draw was?

A We bought that. There was a family by the name of Corthalver, they come from Illinois the same place that my father did. They come earlier and they bought this farm, let's see now, where would that be, you have the gravel bunkers—right in through here, they bought that, that was what we call the Corthalver place and my father bought that in about 19—, oh, in the '90's, I should say.

Q Now, after the river broke through it was flowing over land that had been your father's farm, is that correct?

A Oh, yes, it took about 60 acres through here.

Q Now, when you were a boy, did you used to run cattle in the summertime over to the island across the draw?

A My dad had a hundred cow dairy and we used that for pasture and I was a kid, I had a pony and it was my job to herd those cattle up to it, there was a gate right about there, right at the cemetery hill, and we took them up to the barn and had the boys milk them and we had a milk route here in town at one time also.

Q Uh-huh. Mr. Fischer, would you like to finish marking where the draw was before the river broke through, you started to make some X's?

A I want to know —

Q When it broke through?

A If I can get started here, what does this represent?

Q That is the river, Mr. Fischer, and this is a bar, a gravel bar in the river.

A And the river used to go through here?

Q Something like that, yes.

A Uh-huh.

Q About — excuse me.

A And then what you want to know is how long that gully was —

Q Yes, you said about —

A Well, right to the head of where it broke through, of course.

Q I see. I think that's fine.

A About there.

Q I see. I think that's fine.

A And about there, I imagine.

Q All right.

MR. HERMAN: You added two more crosses, Mr. Fischer, I'm just pointing that out.

WITNESS: Well, that's what I — and there was eventually there was a big pile of gravel right at the head of this, this old river.

MR. HERMAN: Yes.

WITNESS: That went around and all that gravel come from in here through the current, the winter floods. Can you think of anything else?

Q I'm just trying to think, Mr. Fischer, just give me a minute.

A All right. Take your time. Are you getting along all right? (Referring to court reporter)

Q Is it correct, Mr. Fischer, that after 1906 you ran the warehouse down on First Street?

A What, I didn't get that?

Q After 1906 did you run the warehouse down at First and Van Buren by the bridge?

A After, oh yes, before that.

Q And—

A I graduated up here at the college in '03 and then they put me down there, my brother August run the home plant and they bought this here, what we call the Benton Mill, that is the mill about a block this side of the Van Buren Street Bridge and they put me in charge there, and then I had another brother that we owned a mill in Silverton, Oregon and he was down there.

Q And where did you live while you were running the warehouse?

A Well, I was married in '15.

Q I see.

A And then I moved to where I live now, we built that house, I lived on Fifth Street for about a year and a half or two years while we were building the home that I live in at the present time which, as it's marked on the sidewalk, when we went in there in 1917, that is when the house — that is when the house was finished and we moved in there.

Q You didn't live out at the mill property after, say 1900 or so, is that correct?

A After 1900?

Q (Nodding head affirmably)

A Well, I lived there until I was married.

Q At the mill?

A At this house.

Q Oh, I see.

A At what we call Mother's home.

Q Just a moment.

MR. HERMAN: Does the reporter get that all right?

Q Was there a wagon road across over to the island?

A In early days, yes.

Q All right.

A Then as I told you, there was the cemetery that was quite a grade from the river bottom to the mainland and they had to pull that up and then through the draw, it was, as I said, it was about eight feet deep, six to eight feet deep, they had — it was quite a pull for those old horses with a yard of gravel to come up that.

Q You didn't see the actual breakthrough, did you?

A Oh no, no. I was in Illinois, I took my mother back to Illinois in, let's see, in '15. I had an uncle that was very sick and my mother's brother, and they called for her and she was getting pretty well along in age so they asked me if I would go and I was gone about, oh, five or six months and about that time this cut went through, this was about, oh, let's see now, let's see. I have it down here, about 19—, yeah, my brother started the bunkers in '09 and Gallagher bought it in '11 and I should say it took about five years for this break to come through from the main mouth of what would be called mouth of Hogue Creek.

Q I see. And that breakthrough, did I understand you to say it was around 1909 when your brother was operating the gravel business?

A Before that, he built that about 1909.

Q And the breakthrough had already taken place?

A Oh, yes, about five years, because it was—this is the reason there was so much gravel come down there and they put a dead-man there and put the bunkers across and drawed the gravel through here to the old—to the present bunkers.

Q I see.

A Of course, the bunkers have been remodeled a good deal since our time since he put it, enlarged, and then the railroad, see, Carver built a — where's the mainland — where does the Southern Pacific cross the Marys River?

Q That isn't shown on there, Mr. Fischer.

A It doesn't show?

Q No, that isn't on that photograph.

A Well, anyhow —

Q Do you know, did anyone try to clear this gully out of trees or logs or anything?

A No.

Q To your knowledge?

A Just natural winter floods.

Q Did it — all right.

A And the soil was so sandy that it just, the current just washed it. On the Seavy side over here there was a lot of trees through here and naturally they wouldn't—the current wouldn't, the trees' roots held the bank, but over on our side it was just sandy soil.

Q I see.

A In fact, the matter is, years ago people in town here, they bought little tracts in there and had gardens which is now all in here, all gone.

Q All in where the river took it out?

A Yeah, the river washed it out.

Q I see.

MR. MIX: I think we have nothing further.

WITNESS: All right.

MR. HERMAN: Thank you very much, Mr. Fischer.

MR. MIX: Thank you. Thank you very much.

WITNESS: Am I through for the day?

MR. MIX: Yes.

MR. HERMAN: You are through for the day.

WITNESS: Maybe I might be called again?

MR. HERMAN: I don't think so, Mr. Fischer.

WITNESS: Well, someone said it would take a couple days to finish the trial.

MR. HERMAN: I don't think we'll be calling you again.

WITNESS: All right. Thank you very much.

MR. HERMAN: Thank you, sir.

WITNESS: I'm 90 years old.

MR. HERMAN: Mr. McReary, you can resume the stand.

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

Petitions for Certiorari filed
October 14, 1975 (No. 75-567) and
October 15, 1975 (No. 75-577)
Certiorari Granted January 12, 1976

JOINT APPENDIX

TABLE OF CONTENTS

	Page
Relevant Docket Entries (Trial Court)	1
Relevant Docket Entries (Appellate Courts)	3
State's First Amended Complaint	5
Corporation's Demurrer	26
Order Overruling Demurrer	27
Corporation's Third Amended Answer	28
State's Reply	36
Exhibit 59 —1853 Map, G. W. Hyde Survey	38
Exhibit 51 —1887 Map, W. A. Jones	39
Exhibit 62 —1890 Map, J. M. Clapp Survey	40
Exhibits 54 and 257—1911-1913 Map, US Geological Survey	41
Partial Transcript (Fred Fischer testimony)	42
Partial Transcript (Douglas Hastie testimony)	60
Exhibit 71 —Text and Data of River Elevations for Albany, Oregon (1-1-1900 through 12-31-1969)	69
Exhibit 90-B—Letter from Langfitt	80
(attached map)	83
Exhibit 94-A—Report of Examination and Survey of Willamette River	84
Exhibit 98-A—Letter from Clapp	100
Exhibit 110-A—Letter from US Corps of Engineers (1-10-06)	103
(attached map)	106
Exhibit 112-A—Report of Corps of Engineers (11-26-1895)	107

TABLE OF CONTENTS—Continued

	Page
Exhibit 114 —Corps of Engineers' Annual Report Dated: 1871	117
Exhibit 114-C—Corps of Engineers' Annual Report Dated: 1892	127
Exhibit 115 —Corps of Engineers' Annual Reports	
Dated: 1875 (pp 760-768)	134
Dated: 1876 (pp 654-657)	158
Memorandum Opinion	167
Findings of Fact and Conclusions of Law	176
Supplement—Findings of Fact and Conclusions of Law	188
Judgment	190
Court of Appeals Opinion, Schwab, C J	195
Letter allowing corporation's petition for review, dated January 28, 1975	232
Supreme Court Opinion, Howell, J	233
Supreme Court Opinion (clarifying and denying petitions for rehearing) Howell, J	240
Supreme Court Mandate	242
Court of Appeals Judgment and Mandate	243

RELEVANT DOCKET ENTRIES IN TRIAL COURT

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR BENTON COUNTY

12/23/69	Filed: State's First Amended Complaint
4/23/70	Filed: Corporation's Demurrer
5/27/70	Entered: Order—Overruling Demurrer
7/23/71	Filed: Corporation's Third Amended Answer
8/ 1/71	Filed: State's Reply
10/ 5/71	Pre-trial Hearing
10/11-15, 21-22/71)	TRIAL
5/ 3/72	Hearing on matters stricken from Corporation's pleadings
5/25/72	Entered: Memorandum Opinion
6/19/72	Entered: Findings of Fact and Conclusions of Law
6/15/72	Filed: State's Objections
7/ 3/72	Filed: Corporation's Objections
7/ 6/72	Hearing on Objections to Findings
7/28/72	Entered: Supplement to Court's Findings of Fact and Conclusions of Law
7/28/72	Entered: Judgment
8/25/72	Filed: State's Notice of Appeal

9/ 1/72 Filed: Corporation's Notice of Cross-Appeal

9/ 8/72 Filed: Corporation's Supplemental Designation of Record

12/22/72 Filed: Transcript

2/13/73 Filed: Motion to Correct Transcript

3/29/73 Entered: Order—Correcting Transcript

5/14/73 Entered: Order—Settling Transcript

RELEVANT DOCKET ENTRIES IN APPELLATE COURTS

I.

COURT OF APPEALS OF THE STATE OF OREGON

7/23/73 Filed: State's Appellant's Brief

1/ 2/74 Filed: Corporation's Cross-Appellant's and Respondent's Brief

4/17/74 Filed: State's Reply Brief

6/27/74 Record received

7/ 1/74 Filed: Corporation's Reply Brief

7/15/74 Oral Argument: Court of Appeals

9/ 9/74 Opinion Entered (Schwab, CJ)

8/12/75 Issued: Court of Appeals Mandate

II.

SUPREME COURT OF THE STATE OF OREGON

10/ 9/74 Filed: State's Petition for Review (copy to Court of Appeals)

10/ 9/74 Filed: Corporation's Petition for Review (copy to Court of Appeals)

10/22/74 Court of Appeals declined to reconsider its opinion

1/28/75 Denied: State's Petition for Review

1/28/75 Allowed: Corporation's Petition for Review

2/28/75 Filed: State's Supplemental Brief

3/24/75 Filed: Corporation's Reply to Supplemental Brief

4/ 3/75 Oral Argument: Supreme Court

6/12/75	Opinion Entered: Affirmed Court of Appeals as modified
6/20/75	Filed: State's Petition for Rehearing
7/ 3/75	Filed: Corporation's Petition for Rehearing
7/15/75	Petitions denied; Opinion clarified
7/22/75	Filed: Corporation's Motion to Withdraw or Suspend Clarification of Opinion
8/ 6/75	Denied: Corporation's Motion to Withdraw
8/ 7/75	Issued: Supreme Court's Mandate
8/21/75	Issued: Corrected Supreme Court's Mandate

No. 21512—December 23, 1969

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND & GRAVEL COMPANY, an Oregon corporation, Defendant.	No. 21512 FIRST AMENDED COMPLAINT (Action at Law for the Recovery of the possession of Real Property)

I

The defendant is a corporation duly organized and created under the laws of the State of Oregon.

II

The Willamette River is a navigable river located wholly within the State of Oregon and is navigable at the locations hereinafter described.

III

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 1 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal

description set forth in Exhibit "A" which is annexed hereto and thereby made a part hereof.

IV

Said parcel lies wholly within that portion of the bed of the Willamette River which lies between the lines of ordinary low water.

V

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of the original Complaint in this action has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

VI

The reasonable value of the use of said premises for each year of the six years immediately prior to the filing of the original Complaint in this action is, to-wit: $25,000. The reasonable value for the use of said premises for each year during the pendency of this action is, to-wit: $25,000.

FOR A SECOND, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES AS FOLLOWS:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of

the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 2A on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal description set forth in Exhibit "B" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River which lies between the lines of ordinary low water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

V

The reasonable value of the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $6,356.38. The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $6,356.38.

FOR A THIRD, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 2B on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal description set forth in Exhibit "C" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its right bank which lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

V

The reasonable value of the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $1,589.10. The reasonable value for the use of said premises for each year during the pendency of this section following the filing of this First Amended Complaint is, to-wit: $1,589.10.

FOR A FOURTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 2C on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal description set forth in Exhibit "D" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its right bank which

lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

V

The reasonable value of the use of said premises for each of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $1,035.03. The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $1,035.03.

FOR A FIFTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and, except as otherwise alleged in paragraphs IV and V of this cause of action, entitled to the immediate

possession of that parcel of real property which is designated as Parcel No. 3 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal description set forth in Exhibit "E" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River which lies between the lines of ordinary low water.

IV

On July 1, 1963 the plaintiff entered into a lease with the defendant under which lease plaintiff leased to the defendant for a term of 10 years the following described real property:

> That portion of the bed of the Willamette River owned and controlled by the State of Oregon beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream 4,000 feet, all in Section 2, Township 12 South, Range 5 West, Willamette Meridian.

The real property described in said lease includes all or substantially all of the real property described as Parcel No. 3 herein. A true copy of said lease is annexed hereto and thereby made a part hereof and designated Exhibit E-1.

V

Defendant does now wrongfully withhold the possession of Parcel 3 from the plaintiff and for the six

years immediately prior to the filing of the original Complaint in this action has wrongfully and continuously withheld Parcel 3 from the plaintiff except to the extent that said parcel is included in the property leased from plaintiff to defendant under the aforesaid lease.

VI

The reasonable value of the use of said premises for each year of the six years immediately prior to the filing of the original Complaint in this action is, to-wit: $5,000. The reasonable value for the use of said premises for each year during the pendency of this action is, to-wit: $5,000.

FOR A SIXTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 4 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor, which parcel is more particularly described by the legal description set forth

in Exhibit "F" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River which lies riverward of the most easterly line of ordinary low water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $15,000 a year. The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $15,000 a year.

FOR A SEVENTH FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and

at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 5 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor which parcel is more particularly described by the legal description set forth in Exhibit "G" which is annexed hereto and thereby made a part hereof except that plaintiff excludes from Parcel 5, Government lot 11 in Section 12 and the lands between ordinary high and ordinary low water fronting said lot.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its left bank which lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforesaid described real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the

filing of the original Complaint in this action is, to-wit: $5,000. The reasonable value for the use of said premises for each year during the pendency of this action is, to-wit: $5,000.

FOR AN EIGHTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 6 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor and which parcel is more particularly described by the legal description set forth in Exhibit "H" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its left bank which lies between the line of ordinary low and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the pos-

session of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforedescribed real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $3,303.39. The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $3,303.39.

FOR A NINTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 7 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor and which parcel is more particularly described by the legal description set

forth in Exhibit "I" which is annexed hereto and thereby made a part hereof except that plaintiff excludes from Parcel 7 Government lot 11 in Section 12 and the lands between ordinary high and the ordinary low water fronting said lot.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its left bank which lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of the original Complaint in this action has wrongfully and continuously withheld the aforedescribed real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the filing of the original Complaint in this action is, to-wit: $2,000. The reasonable value for the use of said premises for each year during the pendency of this action is, to-wit: $2,000.

FOR A TENTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 8 on that certain map designated Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor which parcel is more particularly described by the legal description set forth in Exhibit "J" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its left bank which lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforedescribed real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $3,000.

The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $3,000.

FOR AN ELEVENTH, FURTHER AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Realleges paragraphs I and II of plaintiff's first cause of action.

II

By virtue of its sovereignty the plaintiff now is and at all times since its admission into the union of the United States has been the owner in fee simple of and entitled to the immediate possession of that parcel of real property which is designated as Parcel No. 9 on that certain map designated as Benton County Survey No. 4825 dated October 16, 1969 and filed on November 4, 1969 with the Benton County Surveyor which parcel is more particularly described by the legal description set forth in Exhibit "K" which is annexed hereto and thereby made a part hereof.

III

Said parcel lies wholly within that portion of the bed of the Willamette River on its right bank which lies between the line of ordinary low water and the line of ordinary high water.

IV

Defendant does now wrongfully withhold possession

of the aforedescribed real property from the plaintiff and for the six years immediately prior to the filing of this First Amended Complaint has wrongfully and continuously withheld the aforedescribed real property from the plaintiff.

V

The reasonable value for the use of said premises for each year of the six years immediately prior to the filing of this First Amended Complaint is, to-wit: $2,000. The reasonable value for the use of said premises for each year during the pendency of this action following the filing of this First Amended Complaint is, to-wit: $2,000.

WHEREFORE plaintiff prays for judgment granting the following relief:

Granting plaintiff the possession of the real property described in plaintiff's first cause of action and $25,000 damages for each year of the six years of the wrongful withholding of said property prior to the commencement of this action, plus $25,000 damages for each year during the pendency of this action that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $25,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's second cause of action and $6,356.38 damages for each year of the six years of the

wrongful withholding of said property prior to the filing of the wrongful withholding of said property prior to the filing of this First Amended Complaint plus $6,356.38 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $6,356.38 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's third cause of action and $1,589.10 damages for each year of the six years of the wrongful withholding of said property prior to the filing of this First Amended Complaint plus $1,589.10 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possesssion of said premises from the plaintiff, and interest on each $1,589.10 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's fourth cause of action and $1,035.03 damages for each year of the six years of the wrongful withholding of said property prior to the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from

the plaintiff, and interest on each $1,035.03 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's fifth cause of action and $5,000 damages for each year of the six years of the wrongful withholding of said property prior to the commencement of this action, plus $5,000 damages for each year during the pendency of this action that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $5,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possehsion of the real property described in plaintiff's sixth cause of action and $15,000 damages for each year of the six years of the wrongful withholding of saia property prior to the filing of this First Amended Complaint, plus $15,000 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $15,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's seventh cause of action and $5,000 damages for each year of the six years of the wrongful withholding of said property prior to the commence-

ment of this action, plus $5,000 damages for each year during the pendency of this action that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $5,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's eighth cause of action and $3,303.39 damages for each year of the six years of the wrongful withholding of said property prior to the filing of this First Amended Complaint, plus $3,303.39 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $3,303.39 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's ninth cause of action and $2,000 damages for each year of the six years of the wrongful withholding of said property prior to the commencement of this action, plus $2,000 damages for each year during the pendency of this action that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $2,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's tenth cause of action and $3,000 damages for each year of the six years of the wrongful withholding of said property prior to the filing of this First Amended Complaint, plus $3,000 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $3,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid;

Granting plaintiff the possession of the real property described in plaintiff's eleventh cause of action and $2,000 damages for each year of the six years of the wrongful withholding of said property prior to the filing of this First Amended Complaint plus $2,000 damages for each year during the pendency of this action following the filing of this First Amended Complaint that defendant has withheld and withholds possession of said premises from the plaintiff, and interest on each $2,000 instalment at the rate of 6% per annum from the end of the year for which said instalment is payable until paid; and for plaintiff's costs and disbursements herein incurred.

LEE JOHNSON
Attorney General of Oregon
THOMAS D. O'DELL
Assistant Attorney General
PETER S. HERMAN
Assistant Attorney General

By PETER S. HERMAN
Peter S. Herman
Of Attorneys for State Land Board
322 State Office Building
Salem, Oregon 97310
Tel. 364-2171, ext. 1717

[Parcel descriptions, jurat and certificate of mailing omitted in printing]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, Defendant.	)	No. 21512 DEMURRER

The defendant demurs as follows:

1. * * * * *.

2. To each cause of action separately on the ground each fails to state a cause of action.

Dated this 21st day of April, 1970.

/s/ ROBERT MIX
Attorney for defendant

[Certificate of mailing omitted in printing]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, Defendant.	)	No. 21512 ORDER OVERRULING DEMURRER

The above-entitled matter having come on regularly for hearing on May 8, 1970, on the demurrer of the defendant to the first amended complaint; the plaintiff appearing through its attorney, Lee Johnson, by Philip J. Engelgau, defendant appearing through its attorney, Robert Mix; the Court having heard the arguments of the parties and being fully advised, now therefore

IT IS HEREBY ORDERED that the demurrer of the defendant be and the same is hereby overruled and the defendant shall have ten days from the date of signing of this order within which to answer the first amended complaint.

DATED this 27th day of May, 1970.

/s/ RICHARD MENGLER
Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff,
vs.
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.

No. 21512
THIRD AMENDED ANSWER

Defendant, for Third Amended Answer to plaintiff's First Amended Complaint, pleads as follows:

FOR ANSWER TO PLAINTIFF'S FIRST CAUSE OF ACTION:

I

Admits I.

II

Denies II, III and IV, and each and every allegation therein contained.

III

Answering V, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering VI, defendant denies that the alleged reasonable annual value of the use of the said premises is $25,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S SECOND CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $2,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S THIRD CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $1,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S FOURTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $1,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S FIFTH CAUSE OF ACTION:

I

Admits I of I and IV.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering V, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering VI, defendant denies that the alleged reasonable annual value of the use of the said premises is $1,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S SIXTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $15,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S SEVENTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $5,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S EIGHTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $2,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S NINTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $2,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S TENTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $3,000 or any other amount.

FOR ANSWER TO PLAINTIFF'S ELEVENTH CAUSE OF ACTION:

I

Admits I of I.

II

Denies II of I, II and III and each and every allegation therein contained.

III

Answering IV, defendant admits that it has withheld possession of the said real property as alleged, but denies that such action is or has been wrongful.

IV

Answering V, defendant denies that the alleged reasonable annual value of the use of the said premises is $2,000 or any other amount.

BY WAY OF FIRST AFFIRMATIVE DEFENSE DEFENDANT PLEADS AS FOLLOWS:

[Omitted]

BY WAY OF SECOND AFFIRMATIVE DEFENSE DEFENDANT PLEADS AS FOLLOWS:

By way of separate defense to each of plaintiff's causes of action, defendant alleges the following:

I

Defendant is the owner in fee simple of the property described in defendant's amended Complaint, except that defendant does not own that portion leased by plaintiff to defendant and does not own parcel Number One hereinafter described which is owned by the City of Corvallis, an Oregon municipal corporation or parcel Number Two which is owned by Winfred Brown and Loretha Brown, husband and wife.

[Parcel description omitted]

WHEREFORE, defendant demands that plaintiff take nothing by its First Amended Complaint, that the same be dismissed, and that the defendant recover its costs and disbursements herein.

/s/ ROBERT MIX
of Attorneys for Defendant

[Jurat, certificate of mailing and verification omitted in printing]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff,	)	
vs.	)	No. 21512
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,	)	REPLY
Defendant.	)	

Comes now plaintiff, STATE OF OREGON, Acting by and through the State Land Board, and replies to defendants Third Amended Answer, as follows:

For Reply to Defendant's First Affirmative Defense:

[Omitted in printing]

For Reply to Defendant's Second Affirmative Defense.

I

Plaintiff denies that defendant is the owner in fee of any portion of the parcels of real property described in plaintiff's Amended Complaint.

II

With regard to parcel NUMBER ONE and parcel NUMBER TWO, as described in defendant's Second Affirmative Defense, plaintiff admits defendant's allegation that the defendant does not own the same. Plaintiff further admits that defendant does not own that certain real property leased by plaintiff to defendant,

being described in paragraph IV of the fifth cause of action of plaintiff's Amended Complaint, page 6, as Parcel 3.

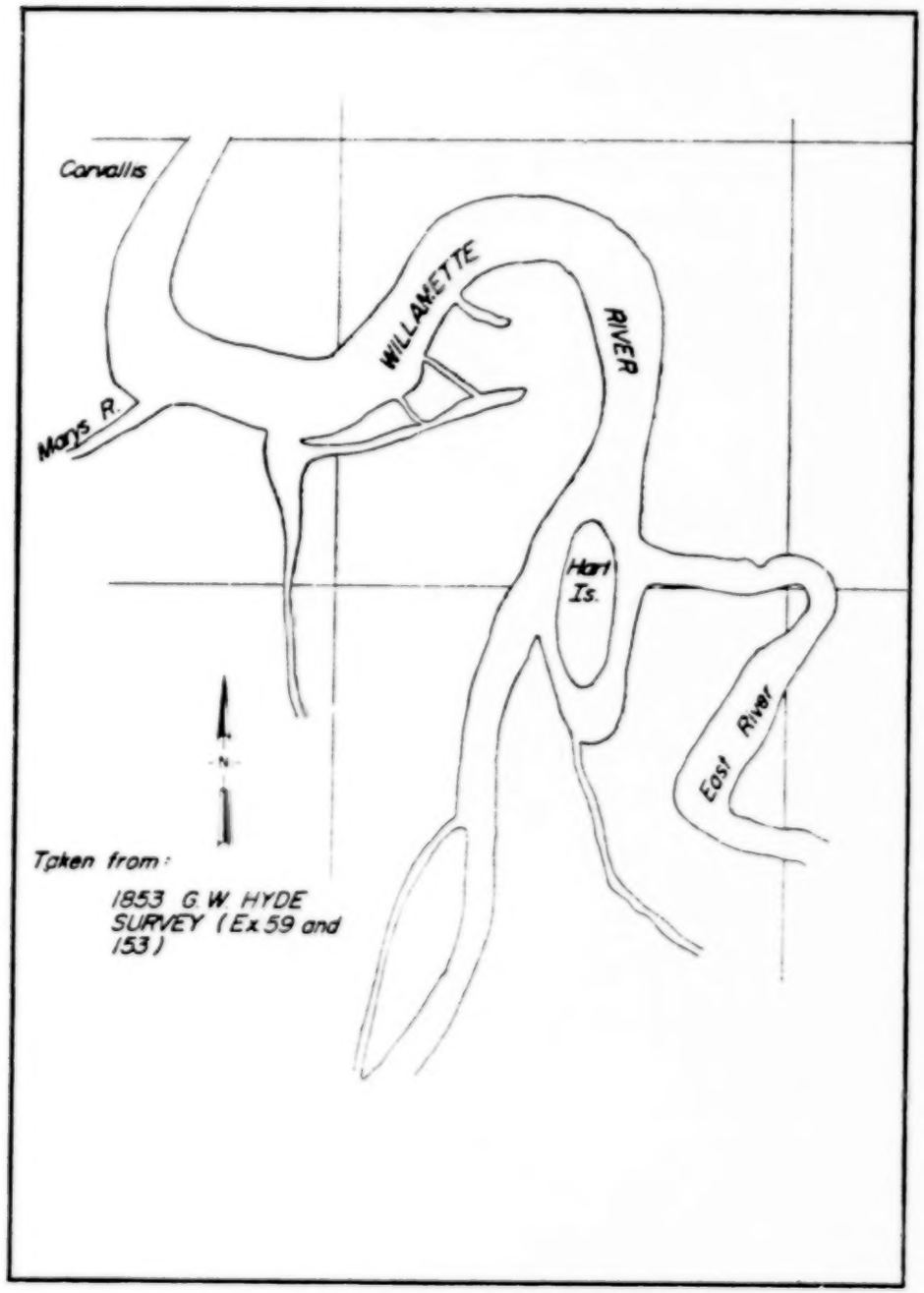
Wherefore, having replied to defendant's Third Amended Answer, plaintiff demands judgment against the defendant as prayed for in its Amended Complaint.

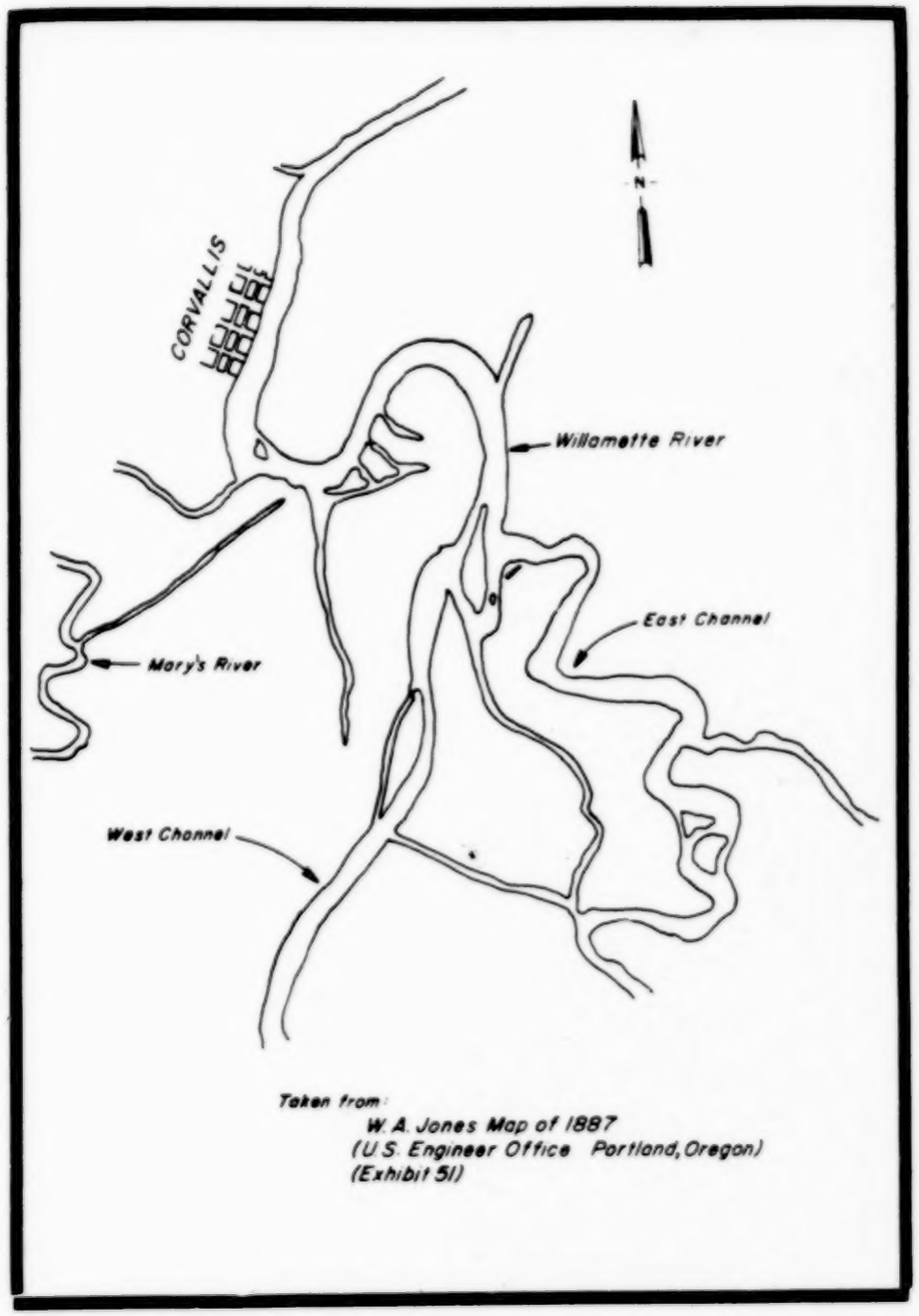
LEE JOHNSON
Attorney General

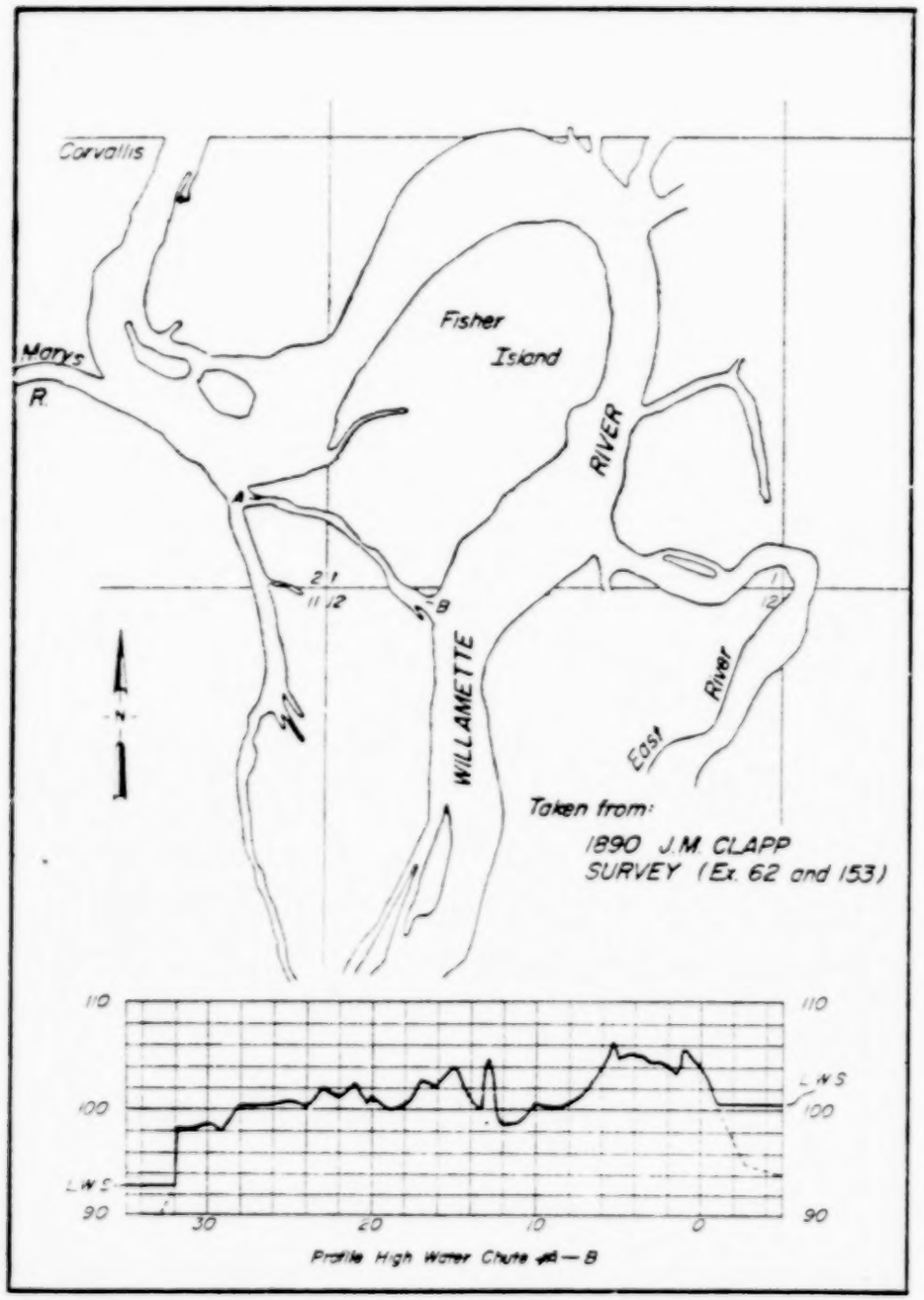
PETER S. HERMAN
Senior Counsel

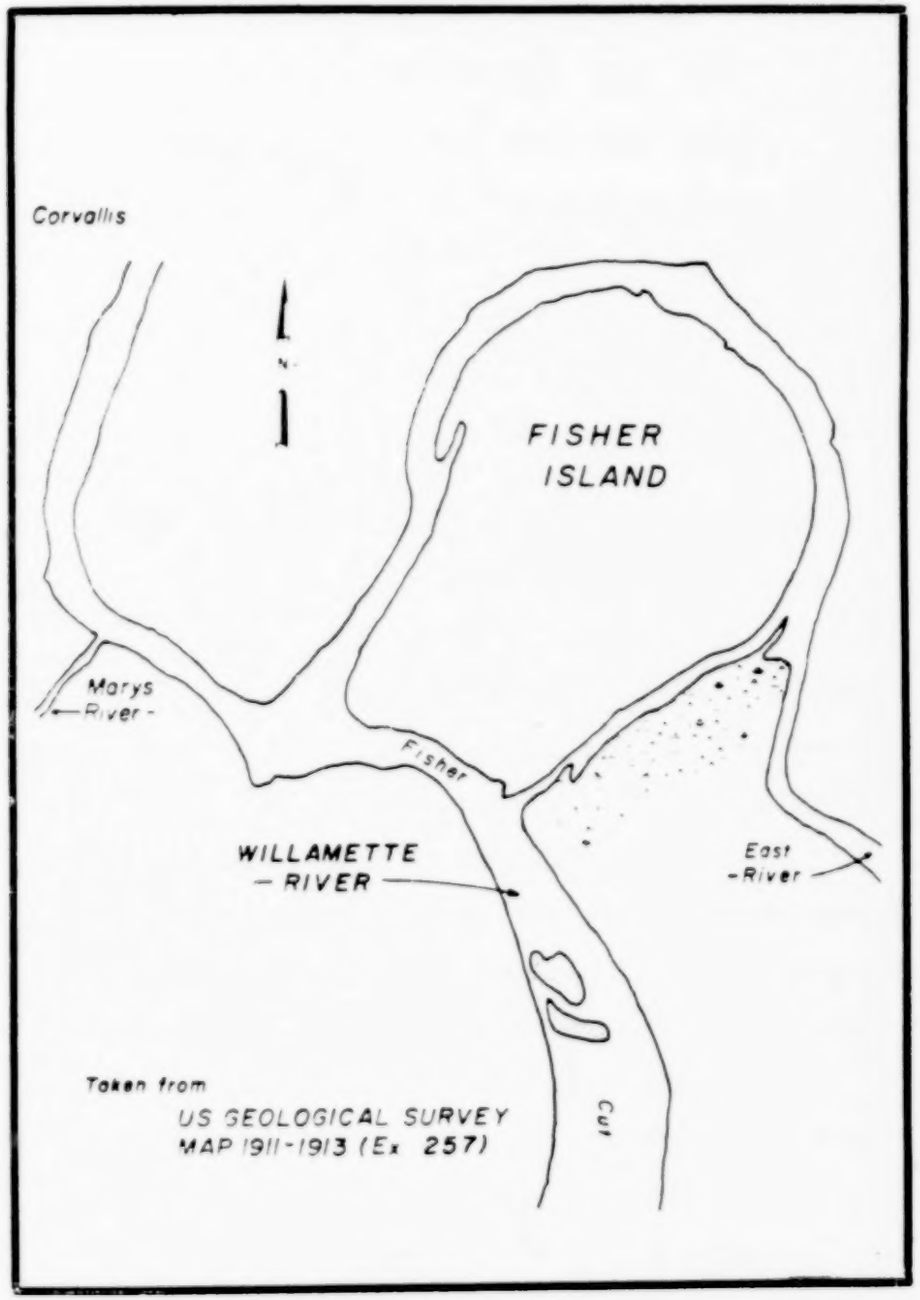
/s/ PHILIP J. ENGELGAU
Assistant Attorney General

[Jurat, verification and certificate of service omitted in printing]


Corvallis
WILLAMETTE
RIVER
Mary's R.
Hart
Is.
East River
N
Taken from:
1853 G.W. HYDE
SURVEY (Ex. 59 and
153)


CORVALLIS
Willamette River
East Channel
Mary's River
West Channel
N
Taken from:
W. A. Jones Map of 1887
(U.S. Engineer Office Portland, Oregon)
(Exhibit 51)


Corvallis
Marys R.
Fisher Island
RIVER
WILLAMETTE
East River
Taken from:
1890 J.M. CLAPP SURVEY (Ex. 62 and 153)
110
100
90
L.W.S.
30
20
10
0
Profile High Water Chute #A—B


Corvallis
FISHER ISLAND
Marys River
Fisher
WILLAMETTE RIVER
East River
Taken from
US GEOLOGICAL SURVEY
MAP 1911-1913 (Ex 257)

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, by and through the State Land Board, Plaintiff,	)	
v.	)	No. 21512
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	)	

PARTIAL TRANSCRIPT—TESTIMONY OF FRED S. FISCHER

[389]

FRED S. FISCHER, being called as a witness, was first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Herman:

Q Can you hear me all right, Mr. Fischer?

A Yes, I'm all right.

Q Would you state your full name for the record, please?

A Huh?

Q Would you state your full name for the record?

A Huh?

Q State your name.

A Oh, Fred S. Fischer.

Q And you reside here in Corvallis?

A Born here, yes.

Q When were you born, Mr. Fischer?

A December 29, 1881.

Q And you have lived here all your life?

A Yes, practically all my—a little time I was at college away from town, but this is my home. I was in Portland for probably six or seven months, went to business college there.

[390]

Q Mr. Fischer, I'm going to have you handed Exhibit 15 which is an aerial photograph.

A Yes, this is Seavy hop yard and this is the Crystal Lake.

Q That's correct.

A And cemetery is here and hop dryers are here, that's right, and the gravel bunkers is at the mouth of this cut and our flour mill was right here.

Q You are pointing where the arrow is and right next to the word "mill," that was the Fischer flour mill?

A Yes, that was the Fischer flour mill and Marys River come in there, doesn't it?

Q That's correct.

A And our home was right—right about there, that's where I was born.

Q Right near to the mill?

A Yes, just—

Q Do you recognize this over there across the river?

A Oh, yes, yes.

Q Fischer Island?

A Fischer Island, yes. That should be a "C" in there but then it's S-C-H, it's German.

Q All right. Now, Mr. Fischer, did you used to play in the area of Fischer Island when you were a boy?

A Yes, yeah, all the young fellows, oh, around 12, 13, 14 years, we used to hunt in there for rabbits.

[391]

Q I see.

A And my brother used to shoot China pheasants over there too because I was too young to use a gun at that time.

Q All right. Did the river used to go around Fischer Island?

A No.

Q How did the river used to go?

A Well, now let's see. This is the new channel, huh?

Q Yes.

A And this is—what is this here?

Q I think that is the old East River.

A East River, and what—you want to know now is where it broke through?

Q That's right, I am interested in this gully I

think you described in your deposition.

A Uh-huh.

Q Some weeks ago.

A Yes. And this here is about, oh, I would judge two and a half to three miles around there.

Q You are talking about Fischer Island?

A Yes, and this here cut here is probably three-quarters of a mile, half to three-quarters of a mile.

Q Is that what you call Fischer Cut?

A Yes, I call that the Fischer Cut and then that draw was right in through here.

Q Do we have—

[392]

A It was—

Q —a crayon, Mr. McReary? Do you want to mark where the draw was, Mr. Fischer?

A Well, if I can locate myself now, this is—what is that?

Q Well, that is an island in 1932—or 1936, Mr. Fischer.

A Oh.

Q That is upstream from Fischer Island, of course.

A Yeah, well now, let's see. Was this Marys River—no.

Q No, that's where the East River meets the Willamette River, the Marys River is down here.

A Oh, I see. This is the East River?

Q That's correct.

A East River, and you want to know—

Q The approximate location of this cut or gully.

A It would be right in through there.

Q Do you want to make a series of crosses?

A Well, now let's see if I understand it right. What does this white represent?

Q Well, I think that's gravel.

A Gravel.

Q Or silt, Mr. Fischer.

A Uh-huh.

Q Remember, this is a 1936 photograph.

A Uh-huh. Well, it would be right in through there, it

[393]

extended and this area is what?

Q Well, that is just part, that is just upstream, Mr. Fischer.

A Uh-huh. Well, this is all dry land now, isn't it?

Q Yes.

A Yeah. Well let's see now, and you want to know where—

Q Well, let's stop there a minute, Mr. Fischer. You have marked three crosses, did you used to play in that area as a boy?

A Yes.

Q What was it, was it a gully?

A Yes, probably 25 feet wide and probably five or six—maybe, oh, seven—between six and eight feet deep.

Q I see.

A Just like that.

Q When would there be water in this gully?

A During the winter rainy season.

Q Would there be any water there in the summertime?

A In certain places where it washed out more, you see, that soil was just sandy soil and it washed down every high water.

Q There was sandy soil in the gully?

A Well, down—well, I'd say the hard pan was the bottom of it, but above that was sandy soil, it washed, the floods washed all the sandy soil out.

[394]

Q Was there a gully there as long as you can remember?

A Oh, yes, as I told you once before, the Lord Almighty made it.

Q So it was there when you were a boy?

A Oh yes, yes.

Q How old do you think you were when you remember it there as a boy?

A Oh, probably eight-nine years old.

Q I see.

A Whenever Mother let me go.

Q I see. Now, you say there was water through that area in the wintertime?

A Oh, yes.

Q What about in the spring?

A The whole island sometimes was covered.

Q Was it overflowed?

A With the extreme high water.

Q I see. Did this gully enlarge during the years?

A Oh, yes it kept going in all the time now.

Q When you say it kept going in—

A Going, going east.

Q You mean moving toward Fischer Island?

A Yes, taking soil away from us.

Q I see.

A Probably as much as, oh, that area, I should judge we lost

[395]

probably through that Fischer Cut probably 60 acres.

Q You mean the water eroded this away?

A Yeah, in time, oh, a period of five years anyway.

Q I see.

A Before it broke through and it kept gradually —gradually and finally the steamboat used to go around here.

Q Around Fischer Island?

A Yes. Now, the Hogue Creek, where is that,

that is up in here, isn't it?

Q Maybe you can point it out, Bob.

MR. MIX: Yes, Mr. Fischer, this is where Hogue Creek comes into the Willamette right here, sir.

A Yeah, yeah. Is Kiger Island over here?

Q This is Kiger Island and this is Booneville up in here.

A Yeah, we had a warehouse at Booneville years and years ago, that was about, oh, about '99, I should say, the Benton Mill, we bought the Benton Mill from the Avery and Gibson Company.

Q I see.

A There was competition between my father and them.

Q I see.

A So he finally bought the town mill, what I call the town mill, and put me in charge in there about 1903 and I was there until the highway bought the First Street property.

Q I see. Mr. Fischer—excuse me.

[396]

A Yes, all right.

Q Was there any water in this Fischer Cut during lower stages of the river?

A Very little, just in places where there was washed out a little more than ever.

Q I see.

A And let's see, they—the boys used to haul gravel, those fellows are all gone now, Lamerson and all that bunch with teams, you see, they hauled gravel and had to go through this cut or this draw and it was quite a pull when they had a yard of gravel or sand up this hill, and then there was another big hill right in here at the end of where Gallagher's land ends now.

Q I see. Was the upstream end of the gully higher than the downstream?

A Oh, certainly, certainly, it wouldn't flow if it didn't, yes, it was just a gradual—gradual grade through there, you see.

Q And it was a gradual process that the river eroded away this gully then finally broke through?

A Well, I think the gravel mostly come from up in here.

Q Gradual process, I said?

A Yes, that's right, and it filled in and filled in and finally we had—well, let's see, the gravel bunkers would be this way, wouldn't it. We have had what we call

[397]

a dead-man over in here for the anchor for the cable that we drawed the gravel from here up into the bunkers.

Q You mean where East River meets the Willamette you hauled gravel across the river or dug it?

A No, this isn't East River, this is the river that comes around Fischer Island.

Q Fischer Island?

A Yeah, that's right, and that's the gravel, the dead-man would be just about—about there.

Q Why don't you put a "D" there, Mr. Fischer?

A All right. Our home would be about there where I was born.

MR. MIX: Yes, that's by the mill, wasn't it, Mr. Fischer?

WITNESS: Just this side of the mill.

MR. MIX: Yes.

WITNESS: In fact, we had a long storage place reach pert near to the house, but in years back it was, oh, that warehouse was probably a hundred feet long and two stories and we stored the flour and mill feed in there.

MR. MIX: I see.

WITNESS: And then they had doors at different places where the trucks could load or mostly wagons then.

Q Do you know when the river finally broke through,

[398]

Mr. Fischer, and you mentioned to me yesterday that your brother sold the gravel bunkers and I think it was in—

A 1909.

Q 1909?

A Yeah, and Gallagher, you see, he started it in about 1909, then he sold to Gallagher in about '11.

Q I see. Had the river broken all the way through by then?

A By the time—oh, yes, that's the reason he built the bunkers because all that gravel from up in here.

Q From upstream?

A Yes, just kept—the winter floods would carry that gravel just like that. (Waving hands)

Q Carrying it into Fischer Cut?

A Through the Fischer Cut, yes.

Q I see.

MR. HERMAN: I think that's all, Your Honor, on direct.

CROSS-EXAMINATION

By Mr. Mix:

Q Mr. Fischer, did your father own the land?

A Yeah.

Q Where the draw was?

A We bought that. There was a family by the name of

[399]

Corthalver, they come from Illinois the same place that my father did. They come earlier and they bought this farm, let's see now, where would that be, you have the gravel bunkers

—right in through here, they bought that, that was what we call the Corthalver place and my father bought that in about 19—, oh, in the '90's, I should say.

Q Now, after the river broke through it was flowing over land that had been your father's farm, is that correct?

A Oh, yes, it took about 60 acres through here.

Q Now, when you were a boy, did you used to run cattle in the summertime over to the island across the draw?

A My dad had a hundred cow dairy and we used that for pasture and I was a kid, I had a pony and it was my job to herd these cattle up to it, there was a gate right about there, right at the cemetery hill, and we took them up to the barn and had the boys milk them and we had a milk route here in town at one time also.

Q Uh-huh. Mr. Fischer, would you like to finish marking where the draw was before the river broke through, you started to make some X's?

A I want to know—

Q When it broke through?

A If I can get started here, what does this represent?

Q That is the river, Mr. Fischer, and this is a bar, a gravel bar in the river.

[400]

A And the river used to go through here?

Q Something like that, yes.

A Uh-huh.

Q About—excuse me.

A And then what you want to know is how long that gully was—

Q Yes, you said about—

A Well, right to the head of where it broke through, of course.

Q I see. I think that's fine.

A About there.

Q I see. I think that's fine.

A And about there, I imagine.

Q All right.

MR. HERMAN: You added two more crosses, Mr. Fischer, I'm just pointing that out.

WITNESS: Well, that's what I—and there was eventually there was a big pile of gravel right at the head of this, this old river.

MR. HERMAN: Yes.

WITNESS: That went around and all that gravel come from in here through the current, the winter floods. Can you think of anything else?

Q I'm just trying to think, Mr. Fischer, just give me a minute.

[401]

A All right. Take your time. Are you getting

along all right? (Referring to court reporter)

Q Is it correct, Mr. Fischer, that after 1906 you ran the warehouse down on First Street?

A What, I didn't get that?

Q After 1906 did you run the warehouse down at First and Van Buren by the bridge?

A After, oh yes, before that.

Q And—

A I graduated up here at the college in '03 and then they put me down there, my brother August run the home plant and they bought this here, what we call the Benton Mill, that is the mill about a block this side of the Van Buren Street Bridge and they put me in charge there, and then I had another brother that we owned a mill in Silverton, Oregon and he was down there.

Q And where did you live while you were running the warehouse?

A Well, I was married in '15.

Q I see.

A And then I moved to where I live now, we built that house, I lived on Fifth Street for about a year and a half or two years while we were building the home that I live in at the present time which, as it's marked on the sidewalk, when we went in there in 1917, that is when the house—that is when the house was finished and we moved in there.

[402]

Q You didn't live out at the mill property after, say 1900 or so, is that correct?

A After 1900?

Q (Nodding head affirmably)

A Well, I lived there until I was married.

Q At the mill?

A At this house.

Q Oh, I see.

A At what we call Mother's home.

Q Just a moment.

MR. HERMAN: Does the reporter get that all right.

Q Was there a wagon road across over to the island?

A In the early days, yes.

Q All right.

A Then as I told you, there was the cemetery that was quite a grade from the river bottom to the mainland and they had to pull that up and then through the draw, it was, as I said, it was about eight feet deep, six to eight feet deep, they had—it was quite a pull for those old horses with a yard of gravel to come up that.

Q You didn't see the actual breakthrough, did you?

A Oh no, no. I was in Illinois, I took my mother back to Illinois in, let's see, in '15. I had an uncle that was very sick and my mother's brother, and they

called for her and she was getting pretty well along in age so they asked

[403]

me if I would go and I was gone about, oh, five or six months and about that time this cut went through, this was about, oh, let's see now, let's see. I have it down here, about 19—, yeah, my brother started the bunkers in '09 and Gallagher bought it in '11 and I should say it took about five years for this break to come through from the main mouth of what would be called mouth of Hogue Creek.

Q I see. And that breakthrough, did I understand you to say it was around 1909 when your brother was operating the gravel business?

A Before that, he built that about 1909.

Q And the breakthrough had already taken place?

A Oh, yes, about five years, because it was—this is the reason there was so much gravel come down there and they put a dead-man there and put the bunkers across and drawed the gravel through here to the old—to the present bunkers.

Q I see.

A Of course, the bunkers have been remodeled a good deal since our time since he put it, enlarged, and then the railroad, see, Carver built a — where's the mainland — where does the Southern Pacific

cross the Marys River?

Q That isn't shown on there, Mr. Fischer.

A It doesn't show?

Q No, that isn't on that photograph.

[404]

A Well, anyhow—

Q Do you know, did anyone try to clear this gully out of trees or logs or anything?

A No.

Q To your knowledge?

A Just natural winter floods.

Q Did it — all right.

A And the soil was so sandy that it just, the current just washed it. On the Seavy side over here there was a lot of trees through here and naturally they wouldn't—the current wouldn't, the trees' roots held the bank, but over on our side it was just sandy soil.

Q I see.

A In fact, the matter is, years ago people in town here, they bought little tracts in there and had gardens which is now all in here, all gone.

Q All in where the river took it out?

A Yeah, the river washed it out.

Q I see.

MR. MIX: I think we have nothing further.

WITNESS: All right.

MR. HERMAN: Thank you very much, Mr.

Fischer.

MR. MIX: Thank you. Thank you very much.

WITNESS: Am I through for the day?

MR. MIX: Yes.

[405]

MR. HERMAN: You are through for the day.

WITNESS: Maybe I might be called again?

MR. HERMAN: I don't think so, Mr. Fischer.

WITNESS: Well, someone said it would take a couple days to finish the trial.

MR. HERMAN: I don't think we'll be calling you again.

WITNESS: All right. Thank you very much.

MR. HERMAN: Thank you, sir.

WITNESS: I'm 90 years old.

MR. HERMAN: Mr. McReary, you can resume the stand.

* * * * *

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, by and through the State Land Board,

Plaintiff,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Defendant.

No. 21512

PARTIAL TRANSCRIPT—TESTIMONY OF DOUGLAS HASTIE

[861]

MR. MIX: All right. Mr. Hastie here? Mr. Hastie, would you come forward, please? We will call Mr. Douglas Hastie, Your Honor.

MR. DOUGLAS HASTIE, being called as a witness, was first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Mix:

Q Will you state your name, please?

A Pardon?

Q Will you state your name, please?

[862]

A Douglas G. Hastie.

Q And, Mr. Hastie, for the record, when were you born, please?

A Where?

Q When.

A In Canada.

Q And what year?

A Eighteen ninety-four.

Q All right. And when did you first come to Corvallis?

A In 1908.

Q Nineteen hundred and eight, and I direct your attention to Thanksgiving Day of 1908, where were you living at that time?

A It was 1909, I think is the year that we were discussing.

Q All right, 1909.

A Yes, I was living down north of Corvallis on the old McFadden place.

Q That would be down in the general area of the sewage treatment plant?

A Just beyond the Dixie Creek where it flows into the Willamette.

MR. HERMAN: Which creek?

MR. MIX: Dixon Creek, it's called popularly Dixie Creek.

Q And will you tell us what happened on that day, please,

[863]

Mr. Hastie?

A Well, we had — you mean about the high water?

Q Yes.

A We had about two or three days of it, but it came up awfully quick and at that particular low place it raised about 18 inches an hour and we were marooned on an island below, couldn't get to town, that is the whole valley was full of water there.

Q Do you recall any of the things that happened to stock and so on?

A Yes, there was a slaughterhouse right there and a lot of the stock got drowned in the slaughterhouse and some swam clear over to the 6th Street railroad track and got out, I remember that.

Q Do you remember how fast the water rose that time?

A Eighteen inches an hour they stated.

THE CLERK: Defendant's Exhibit 232 and 233 marked for identification.

Q All right. If you will just hold them, please. Now, do you associate this with Thanksgiving Day of 1909, is that correct?

A Yes, that's right.

Q All right. I'll ask the Court to take judicial notice of the fact that I have a universal calendar, if I read this properly, the Thanksgiving Day fell on the last

[864]

Thursday in 1909 and that was the 25th of November, and I will submit this to the Court if it wishes to make an examination, and the purpose of this is, we are going to tie this into a particular flood that occurred on that date, Your Honor.

MR. HERMAN: I would like to see it.

THE COURT: Show it to Mr. Herman.

MR. HERMAN: All right. Who prepared this, Mr. Mix?

MR. MIX: I honestly think that came out of the telephone book, a universal calendar we keep in my office.

THE COURT: Well, in any event, his testimony is the last Thursday of November of 1909, we can start from there and then if you—

MR. HERMAN: I have no way of knowing whether this is valid or not, Your Honor.

THE COURT: Well, that I don't—I don't probably either, but I will take judicial notice as best I can.

Q Now, Mr. Hastie, was there anything that occurred in connection with the channel of the river that was, shall we say, discussed in the community at that time?

A I wasn't familiar with it up there that particular time.

Q But did you hear—

A Only what I have heard say, yes.

[865]

Q What did you hear, please?

A I heard—

MR. HERMAN: Just a minute, please.

MR. MIX: Excuse me.

MR. HERMAN: Your Honor, this is hearsay and I would like to know the purpose of the offer.

MR. MIX: Well, yes, Your Honor, common knowledge of historical events by someone who was in the community at the time is admissible and the purpose of this is to show that Mr. Hastie heard in the town, it was a matter of common knowledge that the river broke through the Fischer Cut area at that time.

MR. HERMAN: Well, I don't know as we laid a sufficient foundation to do that.

THE COURT: Well, I'm going to let him testify whatever it is he thinks he knows about what happened in 1909 and I will overrule whatever objection you have, Mr. Herman.

Q All right. Mr. Hastie, was there any discussion in the community at that time, and I am talking about Thanksgiving of 1909, about the Willamette River channel changing?

A Not that I remember of, no, not too much. I can't remember it.

Q Well, I direct you particularly to the Fischer Island

[866]

area, was there any discussions about the channel changing in that area?

A I don't remember too much that there was much said about it, only what—just what I had from friends, you know, I heard.

Q What did you hear, please?

A Well, in—

MR. HERMAN: Well, Your Honor, that definitely is hearsay.

THE COURT: Well, you may have a continuing objection. I will hear what he has to say.

MR. HERMAN: I submit this is not common reputation, if that's what it's being offered for.

THE COURT: I understand.

Q What did you hear, please, Mr. Hastie?

A A friend of mine told me that he could step across the creek there in 1907, that was before I came here.

Q Yes.

A And in 1909 he said the water broke through and made the river there.

Q And we're talking about the area called Fischer Cut, is that correct?

A Yes, that is right.

Q And this is the area where the Corvallis Sand

and Gravel Company operates?

[867]

A Yes, that's right.

Q All right. Sir, now do you know where it broke through?

A Not in particular. I have been by there, but I didn't—I can't say that I viewed the place very observing, where it broke through.

* * * * *

[878]

* * * * *

Q Mr. Hastie, had you actually observed the area called Fischer Cut or is this just something you heard about?

[879]

A Up there at the bar?

Q No, I'm talking about Fischer Cut now.

A Oh, yes. I hauled wood across there after it broke through, after the river broke through.

Q I see.

A They put a ferry in there just across from the Corvallis Sand and Gravel plant, now over there they put a ferry in, the ferry only had to run about as far as across this room and we got out on the bar there, but I have been familiar with the area all my life since I have been here most—

Q What date was this when you were hauling wood across the cut?

A Well, I don't remember quite what year it was, 1911 or '12, along in there somewheres. I don't remember just the exact year.

MR. HERMAN: No further questions.

MR. MIX: We have nothing further, Your Honor.

THE COURT: You may step down.

MR. MIX: Thank you, Mr. Hastie. Thank you very much.

WITNESS: Thank you.

THE COURT: I think we will have about a 15-minute recess before we go any further.

(A recess was taken)

[880]

MR. HERMAN: Your Honor, could we recall Mr. Hastie for a couple brief questions?

THE COURT: You may.

MR. HERMAN: Could we have those photographs?

THE COURT: Here they are.

(Mr. Hastie was previously sworn)

CROSS-EXAMINATION

By Mr. Herman:

* * * * *

Q All right. Now, turning again to Fischer Cut, how wide was the channel when you were ferrying logs across?

A Wood?

Q Yeah.

A I would say it wasn't over fifty feet.

Q Was the river still going around also the old East Channel?

A Oh yes. The old channel they called it then, yeah, that was running quite a lot.

Q This was at the time you were running logs across Fischer

[881]

Cut?

MR. MEAD: Wood.

Q Wood.

A Yes, uh-huh.

MR. HERMAN: No further questions.

MR. MIX: We have no questions, Your Honor.

THE COURT: All right. That's all. You may step down.

MR. MIX: Thank you, Mr. Hastie.

WITNESS: Thank you.

STATE EXHIBIT 71

U. S. DEPARTMENT OF COMMERCE

Asheville, North Carolina

July

I HEREBY CERTIFY that the annexed is a true copy of selected pages from the official publication entitled Daily River Stages containing data for Willamette River, Albany, Oregon for the period January 1, 1900 through December 31, 1969

e in the National Climatic Center, Asheville, North Carolina.

CLYDE M. COLLIER

Archivist

[authentication certificate omitted in printing]

DESCRIPTION OF RIVER GAGES, ETC.

Columbia River System—Willamette River, Albany, Oreg.

1900

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	6.5	5.6	8.4	10.2	4.0	3.3	2.4	1.4	0.7	0.7	10.0	6.4
2	6.6	5.5	7.5	9.0	3.9	3.2	2.3	1.4	0.7	0.8	9.5	7.0
3	7.2	5.5	7.5	8.4	3.8	3.0	2.1	1.4	0.7	0.8	8.5	6.5
4	8.5	5.5	7.4	7.8	3.7	3.0	2.0	1.4	0.7	0.8	7.9	6.0
5	6.6	5.5	7.3	5.4	3.7	2.9	1.9	1.3	0.7	0.9	7.6	5.5
6	6.5	5.2	7.0	5.0	3.8	2.9	1.9	1.3	0.7	0.9	5.3	5.0
7	6.6	5.2	6.5	5.5	3.8	2.8	1.9	1.3	0.7	0.9	5.4	4.5
8	6.7	5.2	8.4	6.0	4.0	2.7	1.8	1.2	0.8	0.9	4.5	4.0
9	6.8	5.5	9.8	6.5	4.0	2.6	1.8	1.2	0.9	1.0	4.3	3.0
10	7.0	6.6	10.5	6.0	4.1	2.5	1.8	1.2	0.9	1.0	3.7	3.5
11	7.0	6.4	9.2	6.2	4.0	2.4	1.8	1.1	0.9	1.0	3.5	3.5
12	8.5	6.2	8.0	5.9	3.8	2.3	1.7	1.1	0.9	1.0	3.2	3.2
13	13.6	6.0	7.5	5.8	3.8	2.2	1.7	1.1	1.0	1.0	3.0	3.5
14	18.2	6.3	7.3	6.0	3.8	2.3	1.6	1.0	1.0	1.0	2.9	3.8
15	24.0	6.0	6.6	6.4	3.7	2.4	1.6	0.9	1.0	1.0	2.7	4.0
16	22.5	5.7	6.3	6.8	3.7	2.5	1.5	0.9	1.0	1.0	2.6	5.0
17	17.3	5.5	6.0	5.7	4.2	2.5	1.5	0.9	1.0	1.0	2.5	5.5
18	16.5	5.3	6.2	5.5	4.0	2.5	1.5	0.9	1.0	1.0	2.7	7.4
19	15.5	5.2	6.4	4.8	3.8	2.5	1.5	0.9	1.0	1.4	3.0	6.5
20	12.9	5.5	5.2	4.5	3.6	2.5	1.5	0.8	0.9	1.9	3.5	6.5
21	10.8	6.9	6.6	4.5	3.5	2.5	1.5	0.8	0.9	2.3	3.0	9.8
22	9.6	12.0	5.9	4.4	3.5	2.5	1.5	0.8	0.9	3.0	3.0	15.8
23	8.5	16.7	5.4	4.2	3.3	2.5	1.5	0.8	0.9	3.4	3.0	18.5
24	8.5	16.0	5.4	4.2	3.3	2.5	1.5	0.8	0.8	4.0	3.0	14.8
25	8.2	12.0	5.4	4.1	3.0	2.5	1.5	0.7	0.8	3.8	4.1	11.5
26	7.9	10.4	6.0	4.0	3.5	2.4	1.5	0.7	0.8	3.5	5.2	10.5
27	7.4	10.4	6.5	4.0	4.0	2.3	1.5	0.7	0.7	3.6	8.8	9.5
28	6.0	9.0	6.4	4.0	4.3	2.2	1.4	0.7	0.7	3.7	8.4	8.0
29	6.5	.....	6.6	4.0	4.0	2.1	1.4	0.7	0.6	3.5	6.4	7.5
30	6.2	.....	8.4	4.0	3.5	2.0	1.4	0.7	0.6	4.4	6.0	7.0
31	5.9	.....	11.5	.....	3.5	.....	1.4	0.7	.....	4.6	.....	6.4
Means.	10.0	7.4	7.2	5.6	3.8	2.6	1.7	1.0	0.8	1.9	4.9	7.1

DESCRIPTION OF RIVER GAGES, ETC.

Columbia River System—Willamette River, Albany, Oreg.—Continued

1901

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	6.0	5.3	14.0	7.0	4.2	4.0	1.9	1.3	0.8	2.2	2.0	5.0
2	7.2	5.0	12.5	6.4	4.2	3.2	1.9	1.2	0.8	1.5	2.0	7.6
3	7.5	4.7	11.5	8.0	4.3	3.5	1.9	1.1	0.8	1.5	2.0	12.4
4	8.2	4.5	10.5	7.6	4.4	3.5	1.9	1.0	0.8	1.5	2.0	12.9
5	7.5	4.3	8.5	7.5	4.4	3.5	1.9	1.0	0.8	1.5	1.8	13.4
6	7.2	4.1	8.0	8.2	4.3	3.4	1.9	0.9	0.8	1.5	1.7	12.5
7	6.0	4.0	7.5	8.7	4.3	3.4	1.9	0.9	0.8	1.5	1.5	11.4
8	7.5	3.8	7.4	9.2	4.3	3.3	1.9	0.9	0.8	1.5	1.4	11.0
9	7.5	3.6	7.5	8.4	4.4	3.2	1.8	0.9	0.8	1.4	1.5	10.5
10	7.0	3.4	7.7	7.5	4.4	3.1	1.8	0.8	0.9	1.3	10.5	15.5
11	6.5	3.2	7.9	7.3	4.7	3.0	1.8	0.8	0.9	1.2	1.5	18.4
12	7.9	3.2	8.0	7.3	4.9	3.0	1.8	0.8	0.9	1.1	1.2	13.5
13	13.6	3.4	7.7	7.0	5.0	3.0	1.8	0.8	0.9	1.0	1.1	10.0
14	20.9	5.0	7.0	6.8	5.0	3.0	1.7	0.8	0.9	1.0	1.0	8.1
15	30.4	7.5	6.2	6.5	5.0	2.9	1.7	0.8	1.0	1.0	1.3	7.0
16	28.4	11.0	6.5	6.1	4.9	2.8	1.6	0.8	1.0	1.0	1.4	6.2
17	23.0	17.4	6.5	5.8	4.9	2.7	1.6	0.8	1.0	1.0	1.8	5.5
18	15.8	26.0	6.4	5.7	5.0	2.6	1.5	0.8	1.0	1.0	1.2	5.3
19	12.2	19.6	6.0	5.5	5.0	2.5	1.5	0.8	1.0	1.0	1.2	5.1
20	10.5	14.0	5.5	5.3	5.1	2.5	1.5	0.8	1.0	1.0	1.5	4.9
21	9.4	14.5	5.1	5.6	5.0	2.5	1.5	0.8	1.1	1.0	1.5	4.5
22	8.5	13.5	5.3	5.9	5.0	2.5	1.4	0.8	1.2	1.0	2.0	4.3
23	8.3	11.4	5.5	4.7	4.9	2.4	1.4	0.8	1.7	1.0	3.5	3.9
24	8.5	11.7	5.7	4.7	4.8	2.3	1.4	0.8	1.8	1.0	9.4	4.0
25	8.1	12.0	5.9	4.3	4.7	2.2	1.4	0.8	1.8	1.0	8.5	4.1
26	7.5	12.4	8.4	4.5	4.6	2.1	1.3	0.8	2.0	1.0	6.5	4.2
27	7.0	12.4	10.4	4.5	4.5	2.0	1.3	0.8	2.2	1.0	5.5	4.2
28	6.5	13.6	10.0	4.2	4.5	2.0	1.3	0.8	2.6	1.0	4.4	4.4
29	6.2	.....	8.9	4.0	4.5	2.0	1.3	0.8	2.5	1.4	3.9	4.5
30	6.0	.....	8.0	4.0	4.3	1.9	1.3	0.8	2.4	1.7	3.8	4.6
31	5.6	.....	7.5	.....	4.0	.....	1.3	0.8	.....	2.0	.....	4.7
Means.	10.4	9.1	7.9	6.3	4.6	2.8	1.6	0.9	1.2	1.3	2.7	7.9

DESCRIPTION OF RIVER GAGES, ETC.

Columbia River System—Willamette River, Albany, Oreg.—Continued

1902

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	4.5	3.9	13.4	5.4	4.5	5.6	2.5	1.5	0.8	1.0	1.0	7.3
2	4.2	3.1	11.5	5.5	5.4	5.6	2.5	1.5	0.8	1.0	1.0	11.5
3	4.2	3.3	10.3	5.6	6.0	5.5	2.7	1.5	0.8	1.0	1.5	12.9
4	4.4	3.5	9.4	5.5	5.9	5.5	4.0	1.5	0.8	0.8	2.4	12.5
5	4.5	4.0	10.6	5.6	5.5	5.5	6.0	1.5	0.8	0.8	2.0	17.2
6	4.6	5.4	11.0	5.8	5.4	5.3	6.2	1.4	0.8	0.8	1.7	24.5
7	6.4	6.6	10.1	6.0	5.8	5.0	5.5	1.4	0.8	0.8	2.4	20.3
8	9.2	8.5	9.5	9.1	5.9	4.8	4.5	1.4	0.8	0.8	3.1	14.5
9	10.2	10.3	8.7	12.2	6.0	4.6	4.2	1.4	0.8	0.8	5.4	15.8
10	8.0	12.4	8.1	11.5	6.0	4.6	3.7	1.4	0.8	0.8	7.6	17.4
11	7.9	17.0	7.5	10.0	6.1	4.5	3.5	1.3	0.8	0.8	6.0	19.4
12	7.0	16.2	7.3	9.4	6.2	4.0	3.9	1.3	0.8	0.8	5.9	16.0
13	6.5	14.5	7.4	8.5	5.8	4.0	4.3	1.3	0.8	0.9	5.9	13.3
14	5.8	12.4	7.5	7.9	5.9	3.8	4.7	1.3	0.8	0.9	4.9	11.7
15	5.5	10.4	7.5	7.1	6.0	3.7	4.7	1.3	0.8	1.0	5.5	10.0
16	4.7	9.9	7.5	7.0	6.4	3.5	4.6	1.3	0.8	1.0	6.4	8.8
17	4.5	9.5	7.5	7.4	6.2	3.5	4.5	1.2	0.8	1.0	7.5	7.7
18	4.5	9.3	7.5	7.7	6.8	3.4	4.3	1.2	0.8	1.0	11.7	6.9
19	4.4	9.6	8.5	8.0	7.5	3.3	4.2	1.2	0.8	1.0	13.1	6.2
20	4.2	9.7	8.5	8.3	8.0	3.2	4.0	1.2	0.8	1.0	14.0	5.6
21	4.1	8.3	8.4	8.0	8.0	3.1	3.8	1.2	0.9	1.0	10.5	6.0
22	4.0	7.9	8.4	7.5	7.9	3.0	3.8	1.2	0.9	1.0	8.8	6.6
23	3.8	7.5	8.2	7.0	7.7	3.0	3.6	1.1	1.0	1.0	7.5	7.0
24	3.7	7.0	8.0	6.3	7.4	2.9	3.4	1.1	1.0	1.0	6.2	7.9
25	3.5	7.5	7.4	6.0	6.8	2.8	3.2	1.1	1.0	1.0	5.5	8.8
26	3.3	9.4	7.2	5.8	6.2	2.7	2.8	1.1	1.0	1.0	5.1	8.9
27	3.1	12.0	7.0	5.3	6.2	2.6	2.5	1.1	1.0	1.0	4.8	9.3
28	3.0	13.0	6.5	4.8	6.4	2.5	2.2	1.0	1.0	1.0	4.9	8.7
29	2.9	.....	6.2	4.5	6.4	2.5	1.9	1.0	1.0	1.0	5.0	8.0
30	2.8	.....	6.3	4.5	6.0	2.5	1.6	1.0	1.0	1.0	5.2	7.4
31	2.8	.....	6.5	.....	5.6	.....	1.5	1.0	.....	1.0	.....	7.0
Means.	4.9	9.0	8.4	7.1	6.3	3.9	3.7	1.3	0.9	0.9	5.8	11.1

DESCRIPTION OF RIVER GAGES, ETC.

Columbia River System—Willamette River, Albany, Oreg.—Continued

1903

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	8.1	13.9	5.4	6.0	4.0	4.6	2.5	1.4	1.1	1.0	1.0	6.2
2	9.5	11.8	5.1	5.7	4.2	4.7	2.4	1.4	1.3	1.0	1.2	5.9
3	11.0	9.5	4.9	5.3	4.3	4.5	2.4	1.3	1.4	1.0	1.5	5.5
4	10.5	8.3	4.7	4.9	4.4	4.2	2.4	1.3	1.5	1.0	1.5	5.1
5	10.0	7.5	4.5	4.7	4.5	3.9	2.3	1.3	1.6	1.3	1.6	5.8
6	9.0	7.0	4.5	4.5	4.5	3.6	2.3	1.3	1.7	1.7	1.7	5.6
7	8.2	6.4	4.5	4.5	4.6	3.6	2.2	1.3	1.8	3.1	2.6	4.5
8	7.5	6.9	4.5	4.7	4.5	3.6	2.2	1.3	1.9	3.0	4.0	4.3
9	6.9	7.3	4.5	5.2	4.3	3.8	2.2	1.3	1.9	2.5	3.9	4.0
10	6.0	7.6	4.6	5.0	4.3	3.9	2.1	1.3	2.0	2.1	3.8	3.8
11	5.8	10.8	4.8	4.9	4.3	3.8	2.1	1.2	2.1	2.0	5.7	3.6
12	5.5	11.4	7.4	4.6	4.4	3.8	2.0	1.2	2.3	2.0	9.1	3.6
13	5.0	10.0	10.0	4.4	4.4	3.7	1.9	1.2	2.4	1.9	12.4	3.7
14	4.8	9.3	8.5	4.4	4.4	3.5	1.9	1.2	2.5	1.8	9.3	3.7
15	4.7	7.9	8.5	4.0	4.5	3.2	1.9	1.1	2.3	1.7	12.2	3.9
16	4.5	6.5	8.5	3.8	4.5	3.2	1.9	1.1	2.0	1.6	12.5	4.1
17	4.3	6.0	7.4	3.7	4.5	3.2	1.9	1.1	1.6	1.6	9.9	5.8
18	4.1	5.8	6.6	3.6	4.6	3.1	1.9	1.1	1.5	1.5	8.4	5.8
19	3.9	5.6	5.8	3.5	4.5	3.0	1.8	1.0	1.4	1.4	6.9	5.8
20	4.3	5.4	5.4	3.4	4.3	2.8	1.7	1.0	1.3	1.4	6.9	5.7
21	5.0	5.2	4.9	3.3	4.2	2.7	1.7	1.0	1.2	1.3	8.7	5.6
22	11.5	6.0	4.7	3.7	4.0	2.6	1.6	1.0	1.2	1.2	11.6	5.5
23	17.5	6.6	4.5	4.0	3.9	2.6	1.6	1.2	1.2	1.2	14.5	5.4
24	18.4	6.3	4.5	4.2	3.8	2.6	1.5	1.4	1.2	1.2	13.8	5.2
25	21.8	6.5	4.6	4.3	3.7	2.5	1.5	1.6	1.1	1.1	13.4	5.0
26	31.3	6.3	4.8	4.4	3.7	2.5	1.4	1.4	1.1	1.1	10.0	4.9
27	27.0	6.0	4.8	4.5	3.7	2.4	1.4	1.5	1.0	1.0	8.7	4.8
28	20.8	5.8	4.9	4.5	4.0	2.5	1.4	1.3	1.0	1.0	8.0	4.6
29	15.6	.....	5.7	4.5	4.1	2.6	1.4	1.2	1.0	1.0	7.2	4.4
30	13.8	.....	6.6	4.2	4.3	2.6	1.4	1.1	1.0	1.0	6.6	4.3
31	14.1	.....	6.3	.....	4.4	.....	1.4	1.0	.....	1.0	.....	4.2
Means.	10.7	7.6	5.7	4.4	4.3	3.3	1.9	1.2	1.6	1.5	7.3	4.8

DESCRIPTION OF RIVER GAGES, ETC.

Columbia River System—Willamette River, Albany, Oreg.—Continued

1904	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	4.2	5.2	14.9	11.2	8.0	4.8	2.5	1.6	1.0	0.9	0.9	2.5
2	4.2	5.2	16.2	9.5	7.6	4.8	2.4	1.6	1.0	0.9	1.0	2.2
3	4.2	5.1	16.4	9.4	7.3	4.8	2.4	1.5	1.0	0.9	1.0	2.6
4	4.3	5.0	14.8	9.3	7.0	4.7	2.3	1.5	1.0	0.9	1.0	2.4
5	4.3	4.9	17.0	8.9	6.6	4.6	2.3	1.5	1.0	0.9	1.0	2.2
6	4.3	5.5	15.3	8.6	6.4	4.5	2.2	1.4	1.0	0.9	1.0	2.0
7	4.4	6.0	13.3	8.5	6.2	4.4	2.1	1.4	1.0	0.9	1.2	1.9
8	4.4	6.5	15.5	8.5	6.0	4.2	2.1	1.4	1.0	0.9	1.2	1.9
9	4.5	6.5	18.6	8.2	5.8	4.0	2.1	1.4	1.0	0.9	1.1	1.8
10	7.5	6.5	21.0	8.8	5.8	3.9	2.0	1.3	1.0	0.9	1.1	2.0
11	10.5	7.5	16.9	9.4	5.8	3.8	2.0	1.3	1.0	1.1	1.0	2.8
12	15.6	11.0	13.6	10.2	5.8	3.7	2.0	1.3	1.0	1.6	1.0	3.9
13	14.0	13.0	12.9	11.1	5.8	3.6	2.0	1.3	1.0	1.9	1.0	5.2
14	12.0	11.8	12.2	11.5	5.8	3.5	2.0	1.3	1.0	1.6	1.0	8.0
15	10.5	13.8	13.1	11.0	5.7	3.5	2.0	1.2	1.0	1.2	1.2	8.9
16	11.5	19.8	13.8	9.9	5.7	3.4	2.1	1.2	1.0	1.4	1.3	9.6
17	11.0	-24.5	12.0	8.8	5.7	3.3	2.2	1.2	1.0	1.6	1.6	8.0
18	10.9	21.0	11.8	7.9	5.7	3.2	2.2	1.2	1.0	2.2	2.0	6.7
19	10.6	14.0	11.9	7.5	6.0	3.1	2.1	1.2	1.0	1.8	2.4	6.8
20	10.3	11.5	12.2	7.4	6.4	3.0	2.0	1.2	1.0	1.7	2.5	6.0
21	9.0	10.7	12.5	7.3	6.0	2.9	2.0	1.2	1.0	1.6	2.5	5.0
22	9.2	10.8	12.0	7.2	6.0	2.8	2.0	1.2	1.0	1.4	3.0	4.8
23	9.0	14.8	11.5	7.0	5.8	2.8	2.0	1.1	1.0	1.3	2.8	4.7
24	8.8	16.9	10.6	6.6	5.6	2.8	1.9	1.1	1.0	1.2	3.2	5.3
25	8.6	16.3	9.7	6.2	5.4	2.7	1.8	1.1	1.0	1.1	2.6	6.4
26	8.5	15.0	9.6	6.6	5.2	2.7	1.8	1.1	1.0	1.0	2.6	7.5
27	7.5	15.5	9.5	7.0	5.1	2.6	1.8	1.1	1.0	1.0	2.5	6.4
28	6.4	16.7	9.5	7.3	5.0	2.6	1.8	1.1	1.0	1.0	2.4	5.7
29	5.6	15.2	10.8	7.5	4.9	2.5	1.7	1.1	1.0	0.9	2.4	6.3
30	5.4	.....	13.4	7.7	4.8	2.5	1.7	1.1	1.0	0.9	2.5	11.0
31	5.2	.....	12.8	.....	4.8	.....	1.6	1.1	.....	0.9	.....	16.8
Means.	7.9	11.6	13.4	8.5	5.9	3.5	2.0	1.3	1.0	1.2	1.7	5.4

-24.7 at 1 p.m.

* * * * *

ALBANY, OREGON

Albany, Oreg. Established January 1, 1892. Is on the Willamette River, 118 miles from its mouth, and 34 miles above Salem, Oreg. The width of the river at average low water is 300 feet. The drainage area above the station is 4,980 square miles.

The river gage is located at the north end of Bradablin street and is in two sections. The first section (0 to 19 feet) is attached to one of the piers of the dock of Westgage Brothers. The second section (19 to 35 feet) is attached to the warehouse of Westgage Brothers and 30 feet nearer the shore line than the first section. Both sections are made of 2 by 8 inch Oregon fir, and are painted white, with graduations cut into the wood and painted black.

B.M., U.S.G.S., 124 feet north of Southern Pacific railroad track, is 40.8 feet above zero of the gage and 212 feet above mean sea level.

Graduation extends from zero to 35 feet above. Highest water was 36 feet, on December 8, 1861; lowest, 0.2 foot, on September 21, 1879. Flood stage is at 20 feet.

* * * * *

DESCRIPTION OF RIVER GAGES, ETC.
COLUMBIA RIVER SYSTEM—WILLAMETTE RIVER
ALBANY, OREG.

1907

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	7.0	15.3	5.8	5.7	4.0	3.0	2.0	1.1	0.9	0.9	1.1	4.6
2	6.5	16.4	6.7	5.6	3.8	3.0	2.0	1.1	0.9	1.0	1.0	4.0
3	6.8	17.8	6.3	5.6	3.7	2.9	2.0	1.1	0.8	1.1	0.9	3.6
4	14.2	20.4	5.8	5.6	3.6	2.9	2.2	1.1	0.8	1.1	1.3	3.3
5	22.2	22.5	5.6	5.2	3.5	2.8	2.0	1.0	0.8	1.0	1.2	3.2
6	25.0	30.7	5.2	5.6	3.5	2.8	2.0	1.0	0.8	1.0	1.1	3.3
7	17.0	28.2	5.0	10.4	3.4	2.7	2.0	1.0	0.8	0.9	0.9	3.2
8	11.5	23.3	5.0	19.8	3.4	2.7	2.0	1.0	0.8	0.9	0.9	3.2
9	9.2	17.0	5.0	20.0	3.4	2.7	1.8	1.6	0.8	0.8	0.8	4.0
10	7.9	13.0	4.8	16.5	3.4	2.7	1.7	1.5	0.8	0.7	0.8	3.9
11	7.0	11.0	5.6	13.5	3.5	2.6	1.6	1.3	0.8	0.7	0.8	4.4
12	6.3	9.9	5.4	11.8	4.0	2.6	1.6	1.2	0.8	0.7	0.7	5.3
13	6.0	8.8	5.0	10.4	3.9	3.3	1.5	1.1	0.8	0.7	0.7	7.5
14	5.6	8.1	5.0	9.0	3.7	3.3	1.5	1.0	0.7	0.7	0.8	11.4
15	5.0	7.5	4.6	8.8	3.6	3.2	1.5	1.0	0.7	0.7	0.9	12.0
16	4.6	7.0	4.4	8.0	3.4	3.1	1.5	1.0	0.8	0.7	1.4	9.4
17	4.2	6.6	4.3	7.0	3.3	3.1	1.5	1.0	0.8	0.7	1.4	7.5
18	4.0	6.4	5.2	6.6	3.4	3.0	1.4	0.9	0.9	0.7	1.2	6.5
19	4.0	5.8	9.1	6.5	3.5	2.9	1.4	0.9	1.0	0.7	1.0	6.0
20	4.0	5.5	10.0	6.4	3.8	2.7	1.4	0.9	0.9	0.7	1.2	6.2
21	4.0	5.2	11.0	6.4	4.0	2.6	1.4	0.8	0.9	0.7	1.8	7.0
22	4.0	5.0	9.8	6.3	3.8	2.5	1.3	0.8	0.8	0.7	3.5	10.3
23	3.9	5.0	8.7	6.0	3.6	2.4	1.3	0.8	0.7	0.6	3.2	17.0
24	3.9	5.0	8.5	5.8	3.6	2.3	1.3	0.8	0.7	0.6	5.0	22.5
25	3.9	5.0	8.0	5.6	3.4	2.3	1.3	0.8	0.7	0.6	7.5	20.8
26	4.6	5.0	7.5	5.4	3.3	2.3	1.2	0.8	0.7	0.6	10.5	23.4
27	5.0	6.5	6.9	5.2	3.2	2.2	1.2	1.0	0.7	0.6	8.3	26.2
28	5.6	6.0	6.2	4.8	3.1	2.1	1.2	1.0	0.7	0.6	6.9	26.5
29	7.7	.....	5.9	5.4	3.0	2.1	1.2	1.0	0.7	0.6	6.0	20.6
30	12.0	.....	5.8	4.2	3.0	2.1	1.1	0.9	0.7	0.7	5.1	14.8
31	14.2	.....	5.7	.....	3.0	.....	1.1	0.9	.....	1.0	.....	11.6
Mean.	8.0	11.6	6.4	8.1	3.5	2.7	1.6	1.0	0.8	0.8	2.6	10.1

DESCRIPTION OF RIVER GAGES, ETC.
COLUMBIA RIVER SYSTEM—WILLAMETTE RIVER—Continued
ALBANY, OREG.

1908

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	10.5	4.0	4.2	5.4	4.4	3.7	3.0	1.5	1.3	0.7	3.1	3.1
2	10.3	3.9	4.5	5.4	4.5	3.6	3.0	1.5	1.3	0.7	3.2	2.9
3	9.6	3.7	4.5	5.3	4.5	3.6	3.0	1.5	1.0	0.8	2.8	2.8
4	8.7	3.6	4.4	5.3	4.5	3.6	2.9	1.5	1.0	0.8	2.6	2.6
5	8.2	4.0	4.2	5.3	4.4	3.6	2.8	1.5	1.0	0.8	2.4	2.4
6	7.0	5.4	4.1	5.0	4.3	3.6	2.7	1.5	1.0	0.8	2.2	2.2
7	7.4	6.5	4.0	4.7	4.1	3.5	2.6	1.5	0.9	0.8	2.0	2.1
8	6.9	7.8	4.0	4.5	4.4	3.5	2.5	1.4	1.0	0.8	1.9	2.1
9	7.5	7.2	3.8	4.2	4.6	3.5	2.4	1.3	1.0	0.8	1.8	2.1
10	10.0	7.1	3.6	4.1	4.5	3.5	2.3	1.2	1.0	0.8	1.7	2.1
11	9.9	6.5	3.6	4.1	4.2	3.5	2.2	1.2	1.0	0.8	1.6	2.0
12	8.8	6.1	3.6	4.0	4.1	3.6	2.1	1.1	1.0	0.8	1.5	2.0
13	8.0	5.8	3.6	4.3	4.0	3.7	2.0	1.1	1.0	0.8	1.5	2.1
14	7.6	5.6	3.8	4.2	3.9	3.8	2.0	1.1	0.9	1.0	1.5	2.7
15	7.5	5.2	5.4	4.4	3.8	3.7	2.0	1.1	0.9	2.6	1.4	3.0
16	7.5	4.9	10.3	4.3	4.3	3.6	2.0	1.1	0.9	6.5	1.4	2.9
17	7.0	5.0	13.3	4.4	5.3	3.5	2.0	1.1	0.9	5.1	1.4	2.8
18	6.4	5.2	13.8	4.5	5.5	3.4	1.9	1.0	0.9	3.8	1.4	2.6
19	6.0	5.0	11.8	4.9	5.9	3.4	1.9	1.0	0.9	3.0	1.6	2.4
20	6.3	4.7	9.4	5.0	6.6	3.4	1.8	1.0	0.9	2.6	2.5	2.2
21	8.3	4.4	8.0	5.2	6.7	3.5	1.8	1.0	0.8	2.6	3.0	2.1
22	8.2	4.2	7.0	5.2	6.1	4.5	1.7	1.0	0.8	2.5	5.8	2.0
23	7.3	4.0	6.3	4.9	5.6	5.0	1.7	1.0	0.8	3.0	6.0	2.2
24	6.8	4.0	5.8	4.6	5.1	4.5	1.7	1.0	0.8	3.0	6.8	3.9
25	6.1	3.8	5.5	6.0	4.8	4.0	1.6	1.0	0.8	2.5	6.5	5.8
26	5.5	3.7	5.4	6.6	4.5	3.7	1.6	1.0	0.8	2.4	5.7	5.4
27	5.3	3.6	5.3	5.9	4.2	3.6	1.6	1.0	0.8	2.3	5.0	7.6
28	4.8	3.9	5.2	5.3	4.2	3.6	1.5	1.0	0.7	2.2	4.4	7.4
29	4.4	4.1	5.1	4.9	4.1	3.4	1.5	1.0	0.7	2.2	4.0	7.3
30	4.4	.....	4.9	4.6	3.9	3.1	1.5	1.3	0.7	2.1	3.5	8.8
31	4.2	.....	4.8	.....	3.8	.....	1.5	1.4	.....	2.1	.....	7.2
Mean.	7.3	4.9	5.9	4.9	4.7	3.7	2.1	1.2	0.9	2.0	3.0	3.5

DESCRIPTION OF RIVER GAGES, ETC.

COLUMBIA RIVER SYSTEM—WILLAMETTE RIVER—Continued

ALBANY, OREG.

1909

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	6.0	6.0	10.6	4.2	3.4	5.3	1.9	1.2	0.9	1.3	1.8	12.0
2	5.3	5.7	10.4	4.6	3.3	5.3	1.8	1.2	0.9	1.4	4.6	11.7
3	5.0	6.3	10.7	5.0	3.3	5.3	1.8	1.1	0.9	1.3	4.0	10.0
4	5.4	7.1	10.4	4.8	3.6	4.9	1.8	1.1	0.8	1.2	4.1	8.5
5	8.8	7.2	10.0	4.6	4.1	4.6	1.8	1.1	0.8	1.1	3.4	7.5
6	10.5	7.2	9.7	4.5	4.0	4.3	1.8	1.1	0.8	1.0	3.0	7.0
7	12.7	7.2	8.4	4.4	3.8	3.9	2.4	1.1	0.8	1.0	3.0	6.5
8	14.2	7.0	7.6	4.2	3.5	3.8	3.2	1.1	0.8	1.5	3.1	7.0
9	15.3	6.6	7.2	4.0	3.3	3.4	2.8	1.1	0.8	1.1	3.3	9.0
10	13.5	6.7	7.3	3.9	3.3	3.2	2.3	1.1	0.8	1.0	3.6	12.3
11	10.5	6.8	6.8	3.9	3.4	3.2	2.0	1.0	0.8	1.0	4.7	11.5
12	8.4	6.7	6.5	3.8	3.6	3.1	2.0	1.0	0.8	1.0	5.8	11.0
13	7.0	7.0	5.9	3.7	3.5	3.1	2.0	1.0	0.8	1.0	4.9	12.7
14	6.4	7.8	5.6	3.6	3.3	3.0	2.0	1.0	0.8	1.0	4.4	14.5
15	6.0	8.1	5.4	3.5	3.2	2.9	1.9	1.0	0.8	1.0	4.2	12.8
16	12.4	8.3	5.2	3.5	3.1	2.8	1.8	1.0	0.8	0.9	3.6	10.8
17	18.2	9.3	5.1	3.4	3.0	2.8	1.7	1.0	0.8	0.9	3.2	8.8
18	20.5	13.5	5.3	3.4	3.0	2.8	1.7	1.0	0.8	0.8	3.0	7.7
19	19.8	15.9	5.2	3.4	2.9	2.7	1.6	1.0	0.8	0.9	3.3	6.8
20	20.3	13.1	5.0	3.3	2.8	2.7	1.6	1.0	0.8	1.1	7.7	6.3
21	21.0	12.6	4.9	3.2	2.8	2.6	1.6	1.0	0.8	1.4	13.3	5.8
22	[1]23.4	12.1	4.7	3.2	2.8	2.4	1.6	1.0	0.8	1.7	14.3	5.3
23	23.3	10.5	4.5	3.0	2.8	2.4	1.5	1.0	0.8	1.7	16.3	4.9
24	18.5	9.2	4.2	3.0	2.7	2.3	1.5	1.0	0.8	1.7	28.5	4.6
25	13.5	10.3	4.1	3.0	2.6	2.2	1.5	1.0	0.8	1.5	[2]29.3	4.4
26	10.9	12.0	4.0	3.0	2.6	2.2	1.4	1.0	0.8	1.2	24.4	4.2
27	9.3	11.2	3.9	[illegible]	2.7	2.1	1.3	1.0	0.8	1.0	18.8	4.1
28	8.2	10.5	3.9	3.2	3.3	2.1	1.3	1.0	0.8	1.0	12.4	4.0
29	7.3	.....	4.0	3.8	4.1	2.0	1.3	0.9	0.8	1.0	11.0	3.8
30	6.6	.....	4.1	3.7	4.5	2.0	1.2	0.9	1.0	1.1	10.7	3.7
31	6.2	.....	4.2	.....	4.6	.....	1.2	0.9	.....	1.2	.....	4.2
Mean.	12.1	10.5	6.3	3.7	3.3	3.2	1.8	1.0	0.8	1.2	8.6	7.9

[1] 23.8 at 3 a.m.

[2] 31.0 at 3 p.m.

78

DESCRIPTION OF RIVER GAGES, ETC.

COLUMBIA RIVER SYSTEM—WILLAMETTE RIVER—Continued

ALBANY, OREG.

1910

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	6.4	8.5	13.8	4.0	3.4	2.3	1.6	0.9	0.7	0.7	0.8	18.8
2	5.8	7.8	16.6	4.0	3.3	2.2	1.5	0.8	0.7	0.7	0.7	13.4
3	5.0	7.0	20.0	4.2	3.2	2.2	1.4	0.8	0.7	0.8	0.8	10.8
4	4.6	6.2	18.3	4.8	3.4	2.1	1.3	0.8	0.8	1.0	0.8	12.7
5	4.2	5.8	16.0	4.6	3.7	2.0	1.3	0.8	0.8	2.3	0.8	14.6
6	4.0	5.6	12.7	4.4	3.8	2.0	1.4	0.8	0.7	2.1	0.8	12.3
7	3.8	5.4	10.0	4.5	3.6	2.0	1.4	0.8	0.7	1.7	1.0	10.1
8	4.6	5.2	9.4	4.4	3.5	2.0	1.3	0.8	0.7	1.4	1.3	8.6
9	5.0	5.0	8.4	4.3	3.4	1.9	1.3	0.8	0.7	1.2	4.7	7.9
10	4.9	4.8	7.6	4.3	3.4	1.9	1.3	0.8	0.6	1.1	4.7	9.2
11	4.7	5.1	7.1	4.5	4.8	1.8	1.2	0.8	0.6	1.0	4.6	8.2
12	4.3	5.3	6.8	4.4	5.7	1.9	1.2	0.8	0.6	1.0	5.0	7.3
13	4.0	5.5	6.6	4.6	5.1	2.2	1.1	0.8	0.6	1.0	4.2	6.6
14	4.0	7.0	6.7	4.5	4.5	2.0	1.2	0.8	0.6	1.0	3.4	6.0
15	4.1	8.6	6.7	4.4	4.2	1.9	1.2	0.8	0.6	1.1	2.9	5.5
16	3.9	8.2	6.7	4.0	3.9	1.8	1.2	0.8	0.6	1.1	2.5	5.1
17	3.8	7.3	6.3	3.8	3.6	1.8	1.1	0.7	0.6	1.0	2.2	5.2
18	3.8	6.5	6.0	3.8	3.3	1.9	1.1	0.7	0.6	1.0	2.1	7.5
19	4.3	7.5	5.9	3.8	3.2	1.9	1.1	0.7	0.7	1.0	2.2	7.0
20	6.4	9.9	6.2	4.0	3.0	1.8	1.1	0.7	0.7	1.0	2.7	6.2
21	6.0	9.5	5.9	4.2	2.9	1.8	1.0	0.7	0.8	1.0	3.0	5.6
22	5.8	9.0	5.6	4.1	2.8	2.0	1.0	0.7	1.0	1.0	4.8	5.2
23	7.2	8.3	5.7	4.0	2.7	2.0	1.0	0.7	1.1	1.0	7.2	4.8
24	9.6	9.0	6.9	3.9	2.7	1.9	1.0	0.7	0.8	0.9	10.9	4.6
25	10.4	10.2	6.4	3.9	2.7	1.9	1.0	0.7	0.8	0.9	9.5	5.1
26	9.7	12.5	5.8	4.1	2.7	1.9	1.0	0.7	0.8	0.9	7.2	5.2
27	9.0	12.4	5.3	4.0	2.7	1.7	1.0	0.7	0.7	0.9	5.9	5.0
28	8.4	12.4	5.0	3.9	2.6	1.6	0.9	0.7	0.7	0.8	6.0	5.0
29	10.0	.....	4.7	3.7	2.6	1.6	0.9	0.7	0.7	0.8	12.3	4.8
30	10.2	.....	4.4	3.5	2.5	1.6	0.9	0.7	0.7	0.8	17.6	4.8
31	9.0	.....	4.2	.....	2.4	.....	0.9	0.7	.....	0.8	.....	5.4
Mean.	6.0	7.7	8.3	4.0	3.4	1.9	1.2	0.8	0.7	1.1	4.4	7.7

79

STATE EXHIBIT 90B

March 7, 1900

Brig. Gen. John M. Wilson
Chief of Engineers
U.S.A.
Washington, D.C.

General:

In compliance with 1st Indorsement (E D 34193) on letter of Hon. Thos. H. Tongue, M.C., dated Feb. 20, 1900, I have the honor to submit the following report relating to the revetment of bank of the Willamette River just above Corvallis, Oregon.

The necessity for this work to prevent a cut-off in the river has been recognized for many years and much money has been spent thereon. Should the cut-off occur it would be disastrous to the regimen of the river in the vicinity and to Corvallis, as the new channel would not pass the town.

The total length of bank revetted before the present work began was about 5,000 feet. Of this the upper 2,000 feet of revetment had been carried away, some portions had been revetted twice and the lower portion also gone. In addition to the revetment work proper a line of piles or posts had been put in approximately on the line shown on the accompanying sketch, for the purpose of catching drift at high water and by the piling up of this drift to form an obstruction to break the current across the point on the line of threatened cutoff. Unfortunately about the time a good body of drift had

collected, fire was set to it by accident or design and the whole accumulation, posts and all practically burned to the ground. So far as present evidence goes, it was doing good work in the direction desired.

For the present at least the loss of the upper portion of the revetment is not serious from the point of view of prevention of the cut off, though it may eventually become so as there is low ground in rear of the bank, but is regretable on account of the caving still going on and the consequent sediment thus thrown into the stream.

There are one or two localities in the old revetment still remaining which need repairs and strengthening, which, if money is available, but this is doubtful, it is proposed to do next summer during low water. The estimated cost of those repairs is approximaately $1,500.00.

The new work recently constructed and referred to in the letter of the Mayor of Corvallis, inclosed with Mr. Tongue's letter, commenced at the point "A" and thus replaces the lower portion of the old revetment that had disappeared. This new work then extends down stream some 1350 feet and is made as substantial and eminent as may be. This is some 860 feet longer than was projected when the work began. This extension in length I found necessary by personal inspection in order to attain any surety of obtaining the object sought. The lower end connects to relatively higher ground and thus the most dangerous portion of the low ground is

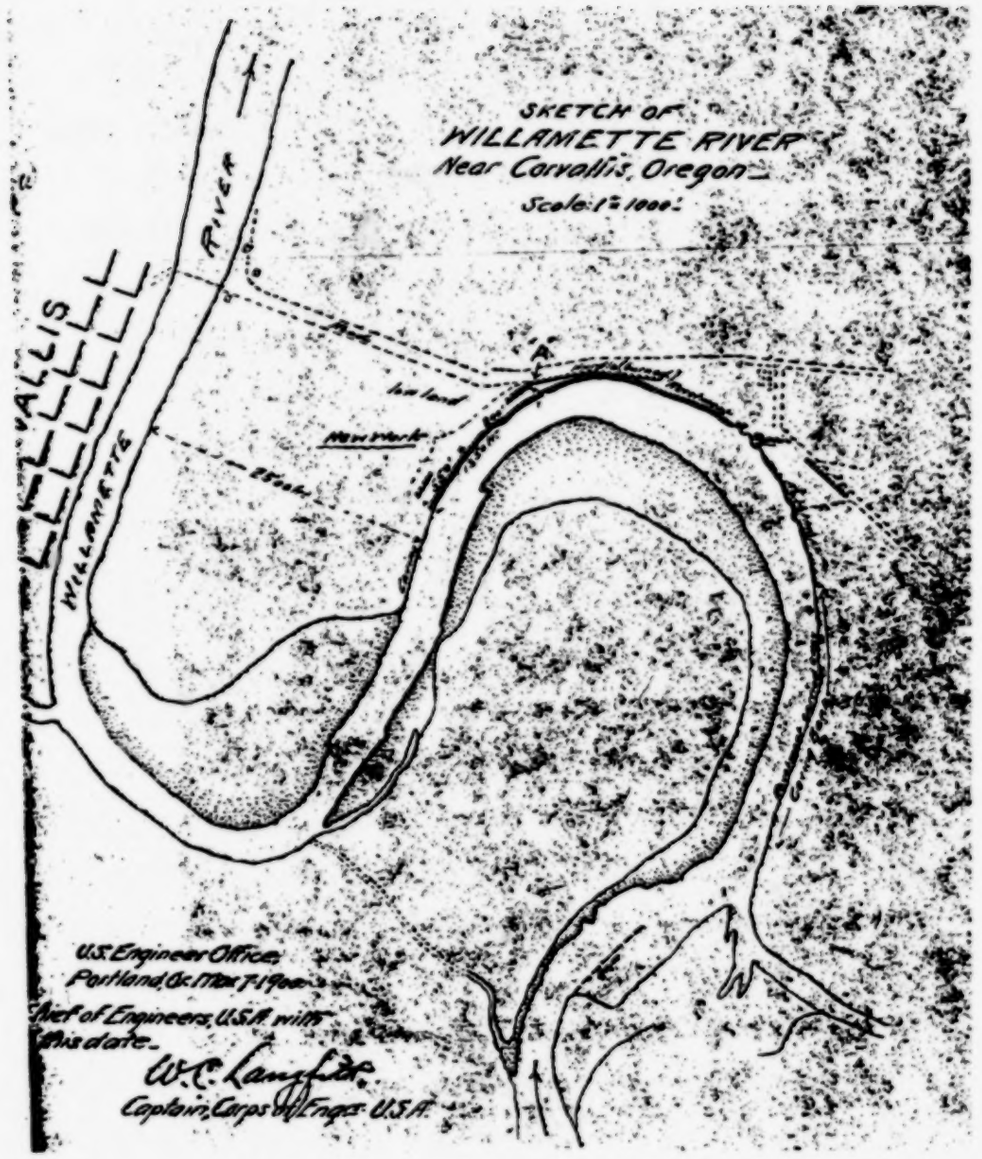
covered by it. This took more money than I should have liked to expend in the vicinity had it not seemed absolutely necessary. It is believed that present danger is averted, but the bank is caving for a distance of about 1000 feet below the lower end of the revetment and will have to be revetted ultimately. At the upper end of the old work the caving mentioned extends for about 800 feet, and this will also have to be done in time. In both cases of course the sooner it is done the better from all points of view. There is now no money available, as balance on hand is more than fully needed for absolutely necessary work elsewhere.

Under favorable circumstances, it is estimated that to revet the two stretches aggregating as shown 1800 feet, will cost, including engineering and contingencies, approximately $11,000.00. Adding the amount estimated for repairs, the total needed becomes $12,500.00.

It may be pertinent to add that from the point of view of the regimen of the river the work is worthy of being undertaken when funds are available. Every stretch of river where the banks are thus made stable and practically unerodable, promotes fixity of channel limits and renders work of improvement easier of design and execution. This is especially true of the Upper Willamette River whose banks are exceedingly variable.

Very respectfully,
Your obedient servant.

W. C. Langfitt
Captain, Corps of Engineers, U.S.A.



BEST COPY AVAILABLE

STATE EXHIBIT 94A

UNITED STATES ENGINEER OFFICE

P.O. Drawer 50

Portland, Oregon

Sept. 1, 1891

REPORT

Examination and Survey of Willamette River, Oregon in vicinity Corvallis, 1890.

Major Thos. H. Handbury,
Corps of Engineers U.S.A.
Portland, Oregon.

Major:-

I have the honor to submit the following report, as a result of an examination and survey, of "The Willamette River," in the vicinity of Corvallis, Oregon, and made in December, 1890.

The object of this survey and examination, was to gain information relative to a cut-off that is threatened through the neck just in front of Corvallis; and to arrive at some conclusion as to the best method to prevent it.

The survey was an extended one and consisted of an examination and meander, of all the high water Sloughs and Outlets, and all the Forks and Channels of the River.

That portion of the River included in the survey, extends from a point one and a half miles North of Corvallis, South to a point six miles South of "Corvallis."

The weather was very favorable nearly all the time

the survey was going on, which was very extraordinary for that season of the year.

(2)

The water surface of the River was the lowest it had been for many years.

This was a great aid, enabling me to become well acquainted with the river bottom and its contracted Channel.

At that season and stage of the water, the river presented the appearance of an unnavigavible (sic) stream.

In the main river the Channel consisted of a series of deep pools, backed up or dammed by bars, having a depth of water varying from 18 inches to 30 inches. These bars as well as the bottom of the river throughout its course, are made up of hard flint like gravel, of a basaltic and volcanic composition, and range in size from a small pea to that of a cocoanut. Over the bars the water flows very rapidly and in almost every instance, especially the more shallow bars, forms into rapids, giving the river the appearance, not unlike that of a Mountain stream.

The course of the river is very winding; consisting of many crooks and bends, the latter being in many instances semi-circular in form.

The river in its normal state is contained between two banks, varying in elevation above the main low water surface, from 8 to 18 feet, and they vary in their distance apart from 200 to 600 feet. During the flood

season these banks are inundated by the rising water, and the river then is contained between two banks, averaging about 35 feet above the low water. The distance these higher banks are apart also varies from

2½ to 6 miles, the latter occuring immediately in front of the town of Corvallis.

The townsite of Corvallis, and in fact on the Corvallis or West side of the river, the land is high, but breaks almost precipitously to the river. On the East side and about 3½ miles South of Corvallis, the bank or bluff, is very similar and runs South enclosing the river at all stages. At this point 3½ miles South of Corvallis, the bluff bears away to the East rapidly; almost at right angles, to its direction for several miles and was not followed up owing to its distance from the river and the pressure of time making it of home (sic) value to confine my work in the vicinity of the river; which was of more importance during the favorable weather.

This river has a very peculiar course and has been subject to many changes during the last fourteen years.

It consists at present of two branches, the East Channel and the West Channel, the former forking and forming a cut-off Channel known as Hogues Slough.

There is but one Steamboat Channel however. The East Channel being the favored one, as far North as the Hogue Slough fork, where the Channel leaves East Chan-

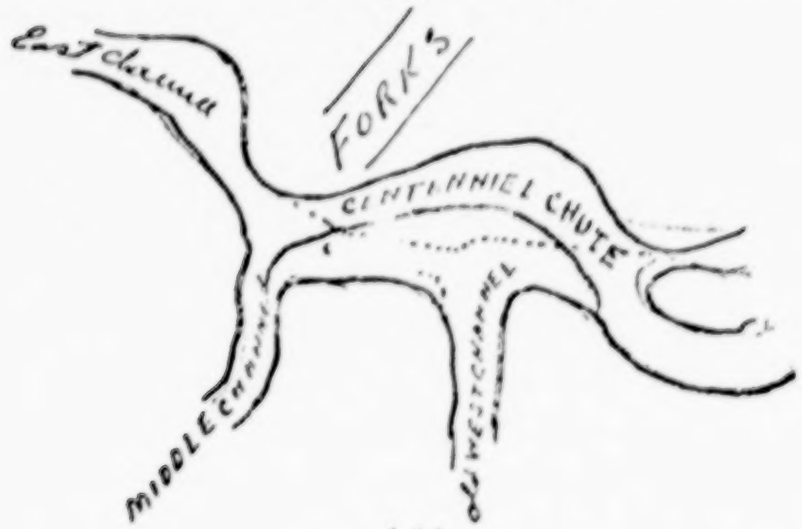
nel or East River and the Steamers find the West Channel through Hogues Slough. The East Channel finds the West Channel about 1½ miles Southeast of Corvallis, where the river is confined for the remainder of its course in one Channel.

Originally the main Channel was by way of the West Channel, but during the flood, of the year of the **Centennial**, 1876, the river changed its course leaving the West Channel by means of a newly formed Channel, which was afterwards named "**Centennial Chute**". Since that time the water has passed in its major quantity down the East river, and the high waters of the succeeding years have now almost completely filled the old West Channel with its deposits of sand, gravel, and sediment, in fact in many places no trace whatever of the rivers bed is visible, no water runs through this Channel except in flood season, when the whole bottom land is inundated and all forms the river bottom.

Still another Channel which I will call "**The Middle Channel**," leaves the East river about one mile North of the old West river fork.

For convenience in describing this point known as "The Forks" I make the following sketch, showing the old West Fork, the original Channel of the river, the present "Centennial Chute" and the present fork of the middle Channel.

Fig. 1. old Bank Channel line ------
new or present bank ———



(4)

Comparatively little water finds its way down the middle Channel at low water; a depth of 3 inches for a width of twenty five feet, was the head over a bar in the Channel. This fork like the main river, consists of pools dammed by shallow bars, which at various points can be jumped, and at others forded without any difficulty, whatever.

This Channel meets the old West Channel at a point by way of the Middle Channel, 3 miles North of the forks, and continues for a distance of about 1½ miles further and meets a stagnant or backed up, Slough, which at high water is fed from a point farther up the river, where the old West Channel left the town of Booneville. This Slough is called the Booneville Channel, and is an over flow from the old West Channel. This addition and in fact the whole as far as Hogues Slough

(the mouth of which is distant about 1½ miles) is a stagnant bay or arm.

Hogues Slough.

The greater amount of water passes through "Hogues Slough". This Channel is a cut-off from the East river and joins the West river, 8000 feet above the mouth of the East river, its course is very winding, the turns very abrupt and the current rapid throughout its whole course and although undoubtly (sic) the best of the Channel is a dangerous Channel to navigate, made doubly so by the sunken and hidden snags or trees, which lie below the surface of the river.

(5)

East Channel.

The East River below the source of Hogues Slough is a very winding, treacherous and shallow stream, with many rapids and bars. The Channel contracts in many places to a width of only 50 feet, and bends away in a direction sometimes greater than a right angle to its direction. Considerable water finds its way down this Channel although at its mouth, where the water is deep, there is but little current and is such that would give an observer the impression that but little water passed through this Channel.

Numerous snags and piles of drift wood are found in East River round which sand and gravel deposits are made and which form the necleus of a bar.

This Channel is exceedingly dangerous, even for a row boat and is impossible, not to say dangerous to navigate, except at very high water.

The Big Bend.

Leaving the mouth of East River at which point the Channels join and form one Channel, that part of the river is almost immediately reached known as "The Big Bend" immediately above Corvallis, here Erosion is going on more or less rapidly all the time and the bank of the river on the East side is tumbling in, and the river gradually working Eastward.

The current here is rapid and strikes the bank with considerable force at an angle of about 45 degrees and is then shot round in a semicircle to reverse and bend

a second time in a semi-circular form ultimately straightening as it passes the town of Corvallis.

At the Big Bend and for considerable distance above it there is great danger of the river changing its course in time and especially if a repetition of the flood of 1890 should occur, with the bank of the river in its present destroyed condition.

Erosion has already begun in two instances, one above Everetts House and hereafter known as No. 1, the other about 700 feet North and below Everetts House hereafter known as No. 2, No. 1 is a great hole scooped out; by the Edding and swiftly running water (which passed over the surface to a depth of about six feet) to a depth in two places 2 feet below the surface of low water and for a length of 700 feet, from this point on to a Slough called Willbanks Slough, a distance of 3400 feet

from the river, the Erosion is very much less, although the path of the swift water is very plainly marked.

Willbanks Slough.

Willbanks Slough is 75 feet wide at the top from bank to bank and about 45 feet wide at the bottom and is 2 feet below the surface of low water of the river. This Slough finds its way in a very direct course to a great Pond called "The Colorado", after a distance of 8900 feet. This Colorado is 1½ miles long and about 800 feet wide at the widest point and 300 feet at the narrowest point. It is separated from the river by a very narrow neck about 4½ feet higher than the low water

of the river and about 200 feet wide. The danger is that the river may cut its way through this neck of 3400 feet of sandy loam to Willbanks Slough and then by way of Willbanks Slough and The Colorado, reach the river three miles below Corvallis; thus leaving Corvallis totally.

There are two projects which could be prepared to avert this danger.

The first is to repair the damage already done by filling in these great holes and continuing the revetment work already begun by the Government all the way round the bend and as far as the mouth of East Channel. Owing to the change in the slope of the bank a slight variation in the project would necessarily have to be made.

The other project would be to divert the course of the river, commencing at a point about a half a mile above the mouth of East river; taking advantage of an overflow Channel (dry at low water) and following this Channel to where it meets the river just above Corvallis—thus cutting off the bend across the bottom land.

The flood of 1890 is chronicled as the greatest flood "The Willamette Waters" have ever occasioned and in all probability it will be many years if at all, such a flood is ever again witnessed. It is my opinion that the threatened danger is not nearly as great as the people of Corvallis and vicinity imagine. However it is essential that this damage should be repaired as early as possible from a financial point of view; for should a flood occur

again with the bank in its present state, the cost of repairing it would be wonderfully increased.

Of the two projects I should recommend the former, as the work already done by the Government has fulfilled its requirements. At the time it was done the threatened cut-off was 2500 feet North of the present danger and immediately where the revetment work stands.

Revetment Work.

The Revetment work is in good repair, save in several places in the row of piling driven in the bank which is completely carried away. These piles should have been driven deeper into the bank when their stability would

have been greatly increased.

I would also recommend that the stone revetment be carried higher up the bank, and that the bank and the land immediately in the vicinity of the bank be planted with balms or willows, something which will take root quickly and by their presence and their roots, make the cohesion of the bank greater and lessen the possibility of the wearing away of the top of the bank by the over flowing water. These balms or trees could be planted by the land owners themselves and at but a trifling cost to them.

The error was with the land owners in cutting down the thick growth of trees and shrubbery, which grew right where it was most beneficial and where the Erosion began directly they were cut away.

The project for diverting the river Channel is hardly

a likely one, owing to the fall of the river between the two points. By the river the distance is 14000 feet, by the cut-off 3500 feet. The fall is 8 feet. The current of the river is even now very rapid in its distance of 14000 feet and would be largely increased through the cut-off.

On comparing the two projects noting the difficulty with which shipping would have to navigate the cut-off; I would strongly recommend the repairing of the revetment work, now existing and its continuance further South, as far South as the mouth of East river.

The difference in elevation of the high water of

Febuary (sic) 1890 and the low water in December of the same year, was twenty-nine feet. The elevation of the river bank in the vicinity of the Big Bend is only twenty three feet, and is of such a slope that the bank to an elevation equal to the high water is about five miles distant.

The only means by which the over flowing waters could be checked, would be to build a Levee, commencing at a point about two miles North of "The Forks" where the high bank bears away Eastward and running along the East bank of East river to a point about ¾ of a mile below Corvallis.

The length of this Levee would be a minemum (sic) 30400 feet practically five miles; which is in a very direct course and which if made to follow the banks of the river would be greatly increased. This Levee would

necessarily have to be about ten feet higher than the present top of the bank and with a slope of 1½ to 1, would require a base 40 feet wide and ten feet on the top.

The amount of land that would be reclaimed by this would roughly be about ten square miles or 6400 acres.

The acerage (sic) that is most damaged by the high water is about 1280 acres or about two sections. This would be a very great expense to build and on account of the great expense would make the project wholly impracticable.

Hurdle Work.

The row of piling or Hurdle work in the bank has proven more of a detriment than a benefit and I would recommend that it be discontinued, and the improvement be confined to the revetment and piling at the water edge. Along the Hurdle line Erosion has taken place to a great extent, caused by the accumulation of driftwood and debris, which acts as a dam and over which the water pours to the ground on the opposite side, thus wearing it away and undermining the piling and ultimately tearing away the Hurdle work. If this were removed and the high water allowed to pass freely over the land, I am of the opinion that the Erosion would be very much lessened and the danger of the rivers cutting a new Channel materially lessened.

A line of levels were run from the Forks to a point one mile below Corvallis, the fall of the river being

found to be twenty five feet, this is by the river about nine miles giving a fall of 2.77 feet per mile of river.

A section of the river was taken at Corvallis and discharge observations made.

Levels were taken over.

1st. The cut-off across the bottom land for the purpose of obtaining information relative to the advisability of changing the rivers course, also 2nd. across the threatened cut-off.

A section 2½ miles long from the high bank on the

East side to the high bank on the West side was run and the levels taken over this section.

Accompaning (sic) the Map of the country surveyed and examined, and this report are; profiles of the flood section line, the cut-off and the threatened cut-off and the sections showing the bank of the river in the vicinity of the bend, with diagrams of proposed project for improvement.

Also a tracing showing the bend as it was when the land Office caused the sectionizing of the country in 1851, and its present position relatively.

The manner in which the notes for this survey were gotten are briefly as follows:—

A Channel transit line was run on the East side of the river from the Ferry landing North to the North boundary of the survey, South from the same point following the bank of the river round the Big Bend, to

(12)

within a quarter mile of the mouth of East river. The opposite shore of the river was gotten by Stadia observations the transit being at points on the transit run line.

Offset measurements were taken at each station of 100 feet to the high and low water lines, as well as to the rows of piling, Hurdle work and revetment.

A transit line was continued up the West Channel, on the West side, the presence of a forest making it necessary to triangulate across the river. The opposite side of the river was gotten by Stadia observations as before.

East River and Hogues Slough were meandered by the Stadia altogether, the growth being so close to the rivers banks made it necessary to adopt this method and the check made by these two lines was remarkably close, 180 feet in a distance of about 14 miles.

Discharge observations were taken in the vicinity of Corvallis immediately at the Ferry crossing, where the rivers bottom is quite regular.

Calculations made from this data, shows a discharge of 3478 cubic feet of water per seconds.

That which passes Portland, Oregon, is 15000 cubic feet per second. The great variance in these figures is accounted for by there being a number of rivers tributary to the Willamette, between Corvallis and Portland.

(13)

The courses were worked up into Latitudes and Departures and platted accordingly. The condensed record is now placed on file in this Office, as "Latitudes and Departures, Willamette River, at Corvallis, Oregon, 1890".

The Map is platted to a scale of 400 feet to an inch.

I have the honor to be Sir,

Very respectfully,
Your obedient servant,
J. M. CLAPP
Asst. Engineer.

U. S. Engineers Office,
Portland, Oregon, Sept. 1st, 1891.
Page Numbers by W.E.M.

To accompany Report of Asst. Eng. Clapp,—Sept. 1, 1891

DATA

Flood Section of the Willamette in Vicinity of Corvallis, Oregon

Area of flood section		132,395 sq. feet.
Net perimiter,		13,416 feet.
Length of section,		13,000 feet.
R = Hydraulic Radius,	$\frac{132895}{13416}$ =	$9,\frac{906}{1000}$ feet.

Elevation.

L. W. Surface at Forks South boundary point A =	244.38
H. W. " " " " " " A	262.91
L. W. " " Carys Ranch Point B	242.86
H. W. " " " " " " B	261.35
A is distant from B	2500 feet
H. W. at point C	253.40
L. W. " " C	242.25
C is distant from A	11,000 feet
L. W. surface at Corvallis Foot of Van Buren Street	219.23
H. W. " " " Foot of Monroe Street	248.27
L. W. " " D a point 7,000 feet below Corvallis	213.0
H. W. " " D " " 7,000 " " "	244.5

"D" is distant from A by the River 55,000 feet or $10,\frac{417}{1000}$ miles

D in a direct line 32,700 feet or $6,\frac{193}{1000}$ miles

L. W. Surface at E a point 16,000′ below Corvallis,	217.1
H. W. " " E " " 14,000′ " "	242.51
W. S. of Colorado	220.80

E. is distant from A by the river 62,000 feet = 11.74 miles

straight 35,700 = 6.76 miles

Difference in elevation of L. W. at A and at E	27.23 ft.
H. W. difference at same points,	20.40 ft.

L. W. fall of river per foot = $\frac{27.28}{62000}$ = .00044 or fall per mile 2.324 ft.

H. W. fall in direct course per foot = $\frac{20.40}{38,700}$ = .0005714 or fall per mile 3.018 feet.

Distance from point A to Corvallis by the river through Hogues Channel equals, 9.091 miles

Therefore L. W. fall per mile to the City of Corvallis, 2.7609 ft.

and

Distance from A to Corvallis in a direct line (H. W. Path = 28,000 feet. equals 5.303 miles.)

Difference of level of high water between these points, 14.64

Therefore H. W. fall per mile to the City of Corvallis = 2.74184 ft.

J. M. CLAPP

Assistant Engineer.

Nov. 15, 1891.

STATE EXHIBIT 98A

Corvallis, Or.
November 29th 1890

Major Thos H. Handbury
Corps of Engineers
U. S. Army

Major:

I have the honor to report the progress of the survey of "The Willamette River" in this vicinity for the week ending November 29th 1890.

I have completed the survey of that portion of the river below Corvallis and am now pushing the triangulations up the Main Channel above Corvallis.

I have walked all over the ground and found many overflow channels and also several of the section corners among which is the township corner just east of the big bend above the city.

I intend to run the Stadia Meander up the Main Channel as far south as the limit of the survey and work from there northward. This I consider the wiser plan as during this weather the river I am told is at its lowest stage. Should rain come soon the river might raise and not afford such a good opportunity to get the present low water line.

I have established a stake flush with the water at either end of the survey in order to obtain the fall of the river during its present state. The levels I will take between these points early this coming week. I have found many marks established by the citizens of

Corvallis and the farmers round about here which will enable me to find accurately the fall of the river during the high water of February 1890.

I have made many inquiries regarding a section of the river in which was contained all of the water during the flood. The narrowest place I have learned was over a mile wide and is somewhere in the neighborhood of Peoria. In the vicinity of Albany the Oregon Pacific Railroad Company have the profile of a bridge crossing but this is below a river tributary to the Willamette and which I am told is a large feeder. This section would not be a true section of the volume which passes Corvallis. I can run this section near Peoria and take the levels over it from H.W.M. to H.W.V.

I have seen the threatened cut off but have not examined it carefully enough to make a report about it.

The Government work which is nearer the river, that is the water now of piling is in very good repair; but a few of the braces which are spiked to the top of the piles have become loosened and could be repaired at but a little cost. The stone revetment work has sunken and slid down the bank; in some places not a little. This is, I judge, caused by the bank being at too great a slope to hold the stone.

Some of the willows and balms used in making the fascines have taken root and have grown from two to five feet high.

The upper or land now of piling has suffered very

much, large portions of it are completely gone and great holes scooped out where they have stood. This now of piling was driven, about 4½ feet into the ground.

I have found a place which appears to carry a considerable quantity of overflow water and which might be converted into a cut off of the bend. I have only walked over this, and will examine it thoroughly again.

If it were cleaned of the driftwood and willow growth so as to give the high water a free channel, I think that the water would enlarge it very much and probably change the course of the river of its own accord as it is a direct chute and the material of a sandy nature.

I am working now about three miles above the town just round the big bend above the city. The weather has been very favorable and I am getting on very well.

Newspaper men have asked me several questions, I have told them I had no information to give beyond that we were making a survey of the Government and have referred them to you.

I have the honor to be

Sir

Very Respectfully Your Obedient Servant

J. M. CLAPP
Assistant Engineer

EXH 110-A, U.S. CORPS OF ENGINEERS
LETTER OF JANUARY 10, 1906

U.W&Y.

UNITED STATES ENGINEER OFFICE

321 Custom House

P.O. Drawer 50 Portland, Oregon

January 10, 1906.

Major S. W. Roessler,
Corps of Engineers, U. S. Army,
Portland, Oregon.

Major:

In accordance with your instructions, on January 4th, I made examination of the Willamette River in the vicinity of Corvallis and found a substantial fraction of the river flowing through the high water "cut off" channel above the City as reported in Mr. August W. Fisher's recent letters to this office. It is roughly estimated that about one quarter of the flow of the river is carried by this channel.

The channel in question is across the neck of a peninsula and is some 3,200 feet long, while the distance around by the main river is two and one quarter miles.

This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to

its foot is noted as about 8 feet. The approximate present location of the channel is shown in dotted lines on the sketch herewith.

The river was at a 4 foot stage at the time of my examination and the banks along this new channel showed indication of recent caving, particularly towards its lower end. The land at the foot of the channel and along the west bank of the Willamette to the mouth of Mary's River is owned by the Corvallis Flouring Mills, and Mr. Fisher, who is the executor and Manager of these mills is naturally apprehensive of injury to his property as well as to navigation and is therefore desirous that the United States make an effort to prevent the development of this new channel.

It is a question whether this channel will increase greatly during high water and even should it do so, whether any actual injury to navigation would result, for the reason that boats use the river above Corvallis very little and then only during high stages, at which time there would be ample depth in the river notwithstanding the "cut off".

It is estimated that a closing dam at the head of this "cut off" of piles, brush and stone, with necessary shore protection at each end, would have to be from 800 to 1,000 feet in length and would cost several thousand dollars if constructed under favorable low water

conditions, and as the interests of navigation do not at present seem imperilled the expenditure seems not justifiable.

This was explained to Mr. Fisher, who visited the "cut off" with me, and he was asked to keep this office informed of any change in the conditions and he was given permission to keep the cut free from lodging trees at its lower end for the purpose of preventing further scour of his land,—and this seemed satisfactory to him.

It is recommended that a further examination of the "cut off" be made at the close of the high water season next spring.

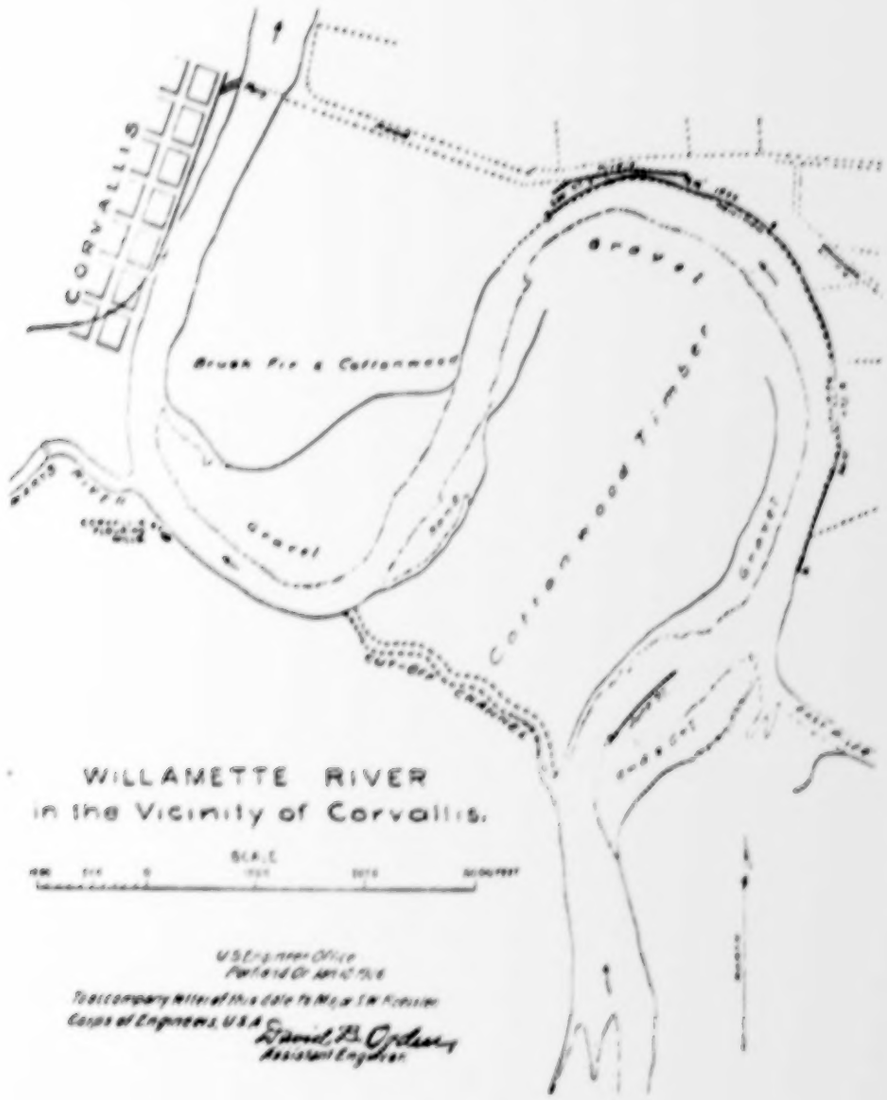
While at Corvallis I also made examination of the mile or more of revetment above the City formerly constructed by the United States and found it to be in good condition.

Very respectfully,

DAVID B. OGDEN

Asst. Engineer.

1 Inclosure.



STATE EXHIBIT 112A

Report of J. H. Cunningham
Assistant Engineer
Portland, Ore.
November 26th 1895

Major James C. Post
Corps of Engineers U.S.A.

Major:

I have the honor to make the following report accompanied by maps, in the survey of the Willamette River from Eugene to Portland.

Obedient to your instructions I left Portland for Eugene October 2nd 1894 and after building a quarter boat and small skiff at Eugene the survey was commenced on October 6th and continued during the months of October, November and December 1894 and March, April, May, June and September 1895.

The work was completed on September 17th 1895. The total time lost on account of high water during these months was one month and a half making the actual time employed on the survey just six months.

The total length of the present main channel from Eugene to Portland is 171½ miles. The side channels and sloughs that were surveyed and mapped will aggregate 76.6 miles. Total length of main and side channels surveyed 248.1 miles.

The maps accompanying this report are drawn on a scale of 1 inch to 1000 ft with exception of the detail maps of special localities which are drawn on a scale of 1 inch to 500 ft. The total fall of the low water

surface from Eugene to Portland is 396.00 ft. Following is a table showing the fall per mile, etc. between different sections of the river.

In ascending the river from Portland the first impediment to navigation is at Clackamas Rapids, 11½ miles above Portland. This is a difficult point for boats to navigate at low stage. The rapids are about 2,000 ft long and at low water will average 150 ft in width and from 5 to 30 ft in depth with a total fall of 5.1 ft. This gives a very swift current at low stage. The bar at this point is caused by gravel brought down by the Clackamas River during freshets. By causing this gravel

to be precipitated on the right side of the river some 500 ft from the steamboat channel this channel might be improved.

. The proposed improvement consists in building a dike from the junction of the right bank of the Willamette with the left bank of the Clackamas River and extending in a westerly direction parallel with the Willamette River for about 2000 ft down stream. This would deflect the current of the Clackamas River parallel with that of the Willamette and having assumed a lesser slope and velocity it would precipitate its debris before reaching the steamboat channel.

Ash Island

From the Clackamas Rapids after passing the locks at Oregon City there is no obstruction to navigation til

Ash Island is reached, 38 miles above Portland. At present the left hand channel is used at low water, but by removing the Wing Dam at the head of the island across the right channel and building a low dam across the left channel it would be an improvement.

At low water boats have some difficulty in going up the left channel on account of shallow water about half way up. The Wing Dam across the head of the right channel is doing no good at present as water is flowing through and around it freely and it only serves as an obstruction to boats passing through this channel.

Candiani Bar

At this point the water divides about 30% of the water passing down the right channel. The old wing dam across head of right channel is doing no good and as this channel is gradually becoming deeper it is probable that if this Wing dam was removed and the snags pulled out this right channel would be preferable to the left.

At present boats navigate the left channel, but as there is a very sharp bend about half way down, and as the depth is decreasing it is evident that the right channel will carry the bulk of the water if it is cleared of obstructions.

Weston Bar

At this place the lower wing dam should be removed as it is an obstruction to navigation, and the upper one repaired and extended to connect with the left bank. Ac-

cording to reports of steamboatmen this upper wing dam has been beneficial in improving the channel and should be maintained.

Table No. 1

Town	Dist. Mis.	Elevation of Low Water Feet	Total Fall Feet	Fall per Mile Feet	Diff. bet. Low & High Water Feet	Remarks
Portland	11.2	0.0	0.50	0.044	33.5	Low Water Oct. 1895 -0.50 on Stark St. Gage
Foot of Clackamas Rap.	0.5	0.50	5.14	10.28		
Head of Clackamas Rap.	1.8	5.64	0.0	0.0		
Oregon City Below Falls		5.64			48.2	Feb. 1890
Oregon City Above Falls	23.45	47.35	2.93	0.12	21.1	Feb. 1890
Roger's Landing	34.85	50.28	56.72	1.63		
Salem	11.00	107.00	22.40	2.04	40.9	Dec. 1861
Independence	23.70	129.40	36.31	1.58	31.94	Feb. 1890
Albany	11.75	165.71	18.14	1.54	31.94	Feb. 1890
Corvallis	12.64	183.85	31.85	2.52	25.00	Approximate
Peoria	20.36	215.70	70.78	3.42	19.5	Approximate
Harrisburg	20.15	285.48	109.53	5.01	15.5	1890

(Ex 112A p 3)

Feaster's Rocks

About one half mile above here the channel divides at low water, the left channel however is the one used by boats at present. But if the snags were removed and the water deepened a little at the head, the right channel would be much the best. This was formerly the old steamboat channel.

Wheatland Bend

About one half mile below Wheatland, the high water chute to left is becoming deeper, it now begins to draw water at the 2 foot stage, immediately above this chute, on left side, the bank is about 20 feet high composed of clay with gravel subsoil near the low water line. This bank is caving very rapidly, and, at one place it runs out to a very narrow neck only 30 ft wide. The river is liable to break through here any time at high water, in which case it is probable that nearly one half the water would pass down Lambert Slough to the great detriment of navigation below this point. Revetting the bank and building a dike across this the head of this chute is suggested as an improvement. The total length of this revetment and dike would be about 2300 feet.

Windsor Island

At the upper end of this island the chute to left draws about 5% of the water; a wing dam across the head of this chute would improve navigation around the right side of Windsor Island. The left bank of this side chute is about 20 feet high composed of a sandy loam on top and a sand and gravel subsoil. It is proposed to build the wing dam some 200 feet down this channel and immediately below where the small slough comes in, thus confining the waters of both these side chutes to the main channel.

Salem

I made a careful examination of the river banks at this point as it is thought by the people in West Salem that there is danger of the river cutting through the bank where the high water current is shown on detail map. The bank here is composed of a good stiff clay with about 2 feet of sandy loam top soil, and is from 10 to 15 feet high. At extreme high water there is from 20 to 30 feet of water across this bend, but I failed to find any evidence of much current. There is no drift except on the low water line and the top soil which is a sandy loam of about 2 feet in depth shows no indication of erosion by the current except near the river.

It is a significant fact that the people of Salem do not seem to be alarmed, and the farmers living on the west side are the only ones showing my concern; and this appears to be principally for their crops and buildings which are sometimes destroyed by high water.

(Ex 112A p 4)

Romers Bar

At present this is the head of navigation at low water, but by closing the side chute to left above Doves Bar it would make both these bars navigable.

This side chute draws about 10% of the water and could be closed by a wing dam 300 feet in length.

Independence Bend

About one mile below Independence where the river bends to the right, there is some danger of a low water

chute forming leading to La Creole Creek about five miles north; at the 8 foot stage water begins to pass over the high water outlet (shown on map) to a narrow deep slough about 2000 feet from the river and leading north to La Creole Creek. There is considerable drift along this high water outlet showing the presence of a strong current. It is proposed to protect the bank here by a revetment 1500 feet long and extending at least 10 feet above low water.

Santiam Bar

The greatest depth I found on this bar (during low water of November 95) was one foot. This is less water than I found anywhere between here and Portland. From observations of this place at high water during the month of April 1895 it appears that the Santiam Bar is formed by the meeting of the currents of the Lower Santiam River and the Willamette at nearly right angles. This checks the two currents sufficiently to cause them to precipitate the debris at this point.

During the high water of April 17th 95 (seven and one half feet above zero of gauge) I noticed a large whirlpool at this place and a cross current from the Lower Santiam setting in towards the wing dam opposite. This would indicate that the Santiam deposits its gravel over near the old wing dam on the left shore of the Willamette while the checking of the current of the Willamette causes it to pricipitate (sic) its debris immediately above the mouth of the Lower Santiam. To

prevent this it is proposed to build a wing dam from where the right bank of the Willamette intercepts the left bank of the Lower Santiam and extending down stream (nearly parallel with the old wing dam on the left side of the Willamette) about 600 feet. This dam should project at least 8 feet above low water.

Black Dog Bar

Very shoal, about 1½ foot deep at low water. The side chute to right above this bar draws nearly 10% of the low water flow. By closing this side chute I estimate that this bar could be deepened about four inches or more. It is proposed to build a dam 500 feet long extending from the right bank across the side chute to and around the head of

(Ex 112A p 5)

the island shown on map. This dam should extend about four feet above low water.

Pine Tree Bar

1½ foot deep at low water. There are a few piles left from the old wing dam but from what I can learn this dam was of no benefit and the channel would probably be deepened by removing the remaining piles as they only serve to collect drift.

Bowers Bar

The reef of rocks running out from the right shore and extending to within 100 feet of the left bank, leave a narrow deep channel next to the left bank but as the current is very strong towards this bank it makes

a dangerous place for boats coming down stream. These rocks rise but a few inches above low water and could be easily blasted out.

Magoogalon Bar

There is less than a foot of water at the head of this bar. The chute to right draws about 10% of the low water flow. By constructing a wing dam from the right bank above this side chute diagonally across the upper end of the gravel bar and concentrating the low water discharge in the left channel, this could be made navigable. From this point to Corvallis the ruling depth is not less than 3 feet.

Above Corvallis

The river divides into numerous branches, very crooked swift and narrow. In the main channel it ranges from 1 to 40 feet in depth. The bed is uniformly of coarse gravel and the banks are from 5 to 20 feet in height. In times of freshets all banks under 20 feet are covered by high water (except above Peoria where the flood level rarely exceeds 15 feet).

As the banks are generally of a loose sandy soil or gravel, they are constantly caving and precipitating trees into the river. It is impossible to prevent this by any reasonable expenditure except in a few cases. The revetment built in the Spring of 1895 above Corvallis, seems to be holding very well, but has had no severe test yet as there has been no high water since it was built.

About one mile below Harrisburg the river bends sharply to the left, the current is very swift and the right bank which is 15 feet high and composed of yellow clay and gravel is caving rapidly. From information received I should estimate that a strip 200 feet long had washed off during the past ten years. During the flood of 1890 a strip about 24 feet wide was washed off.

It is proposed to protect this bank by a revetment about 3000 feet long.

* * * * *

STATE'S EXHIBIT 114

UNITED STATES OF AMERICA

DEPARTMENT OF THE ARMY

Portland, Oregon 24 June 1971

I HEREBY CERTIFY that

[certificate omitted in printing]

ANNUAL REPORT

OF THE

CHIEF OF ENGINEERS

TO

THE SECRETARY OF WAR

FOR

THE YEAR 1871.

WASHINGTON.

GOVERNMENT PRINTING OFFICE.

1871.

(Pages 906 and 907)

* * * * *

SAN FRANCISCO, CALIFORNIA

December 23, 1870.

MAJOR: In accordance with your order of September 7, 1870, I left Portland, Oregon, with my party, on September 8, and proceeded up the Willamette River by steamboat to Salem, Oregon. This was done to see the obstructions to the navigation of the river, as well as what had been done toward improving it by the Steamboat Company.

After leaving Oregon City, we steamed up the river

for about five miles and arrived at Rock Island, where the river widens and the channel becomes tortuous. During high water the river rushes down the channel, which contains points of rocks and rocky reefs, under which eddies are formed, rendering navigation difficult; but during ordinary stages of the river, steamboatmen consider it perfectly safe. They do not, therefore, deem any immediate improvement necessary. After leaving Rock Island, the river contains a good depth of water, until we arrive opposite the mouth of Molalla River, one of the tributaries of the Willamette, ten miles above Oregon City, where a shoal is formed consisting of small gravel and boulders. As the boats cross the shoal without difficulty, no improvement is deemed necessary here. Proceeding farther up the river, we find deep water, until arriving just below the mouth of the Yamhill River, another tributary, about thirty-five miles above Oregon City. Here a shoal extends entirely across the river, carrying about three feet of water. The river is about 1,000 feet wide, the channel narrow, and the current rapid. The shoal is gravel, which vary in size, but averaging about four inches in length, nearly flat, with rounded edges. This shoal is probably due to the increased width of the river, as well as to the gravel brought down by the Yamhill River during its annual freshets. The river might be temporarily improved here by a system of wing-dams, but the boatmen say that bars higher up the river are so much worse than

this one that they do not consider the Yamhill Bar a serious obstacle to navigation.

Between Yamhill Bar and Salem are numerous shoals, covered by 24 to 30 inches depth of water, with deep water between them. The names of the bars are Runaway Bar, Bennett's Dread, Five Islands, Two Head, Matheney's, Beaver and Lone Tree Rapids, McCloskey's Chute, and Chitwood Bar. Each of these shoals are of the same nature. Of the bars just mentioned, Matheney's, Beaver, and Lone Tree Rapids and Chitwood Bar are the worst, on account of the channel being less wide and more tortuous than on the other bars. The depth of water is about the same on each of these bars.

Steamboats navigate the river between Oregon City and Salem (sixty-five miles) during the entire year, and as far as Corvallis forty-two miles above Salem, during nine months of the year. During a high-water stage of the river, they run up as far as Eugene City, about eighty miles above Salem.

From the 1st of October to the 1st of August the river is said to be high, and the boats make their trips regularly, transporting heavy loads of freight; after that navigation above Salem ceases, and all towns above Salem either have to wagon their grain and supplies to or from Salem or stow them away until navigation reopens.

The bars between Salem and Corvallis are not very numerous. They are of a similar nature to those below,

but have a few inches less depth of water, and the boulders become larger as we go higher up the river. Above Salem we surveyed Humphrey's Rapid and Bowers Bar. They are considered the worst bars in the whole river, and if they were improved, it is thought navigation would open to Corvallis during the entire year. The names of the other bars above Salem are Eola Bar, Rocky Rapids, Independence Bar, Buena Vista Bar, Luckamute Bar, and Long Crossing. None of these, however, are considered serious obstacles to navigation. The upper Willamette River varies in width from 300 to 1,000 feet; its average width from Albany to Oregon City is probably 500 feet. At every shoal on the river it is wider than it is immediately above or below the shoal. The difference between the highest water and low water of this river varies at different places. Where the banks are high it is said to be as much as 60 feet; at Salem it is about 40 feet. The banks of the river generally are low, and heavily timbered for a distance of about half a mile in width; beyond that is fine prairie land, forming by far the most valuable farming land in the State.

During the year, October 1, 1869, to October 1, 1870, 51,437 tons of freight were carried by the boats navigating the river. The People's Transportation Company monopolize the carrying trade of the river. They run seven steamboats above the falls at Oregon City and two below. Within the last few years this company has improved the navigation at Chitwood, Matheney's and

Runaway Bars by building wing-dams in the river, thereby contracting its width and causing the increased current to wash the finer gravel from the shoals into deeper water below the dams.

The results in some cases were satisfactory, and would have been better had the dams been better constructed and placed in more favorable localities. As a rule, they were roughly constructed, and consisted of a log being thrown into the stream, making an angle of about 135° with the current. Willow bushes and gravel were then thrown in on the up-stream side of the log. The log, being aground, would remain in place until the water raised, when it would be carried away. In a few instances the dams were constructed by driving light piles into the gravelly bed of the river, then placing the logs against the piles, and brush and gravel against the logs. The dams so constructed are still standing.

The danger to be apprehended in building wing-dams in the river is, that the current striking the dam is deflected to the opposite shore, which, if it be of a soft character, is gradually washed away, leaving the river as wide as before the dam was constructed. When the banks are washing away, the trees fall into the river, ground, and offer a partial protection to further wash until the river rises and floats them off. The current then carries them off until they lodge on some gravel-bar, where they form a wing-dam, and sometimes pro-

duce a bad effect. The river pilots say that at nearly every bar the channel changes from year to year; it is therefore, probable that any change which a wing-dam will produce on a bar will be temporary. It will produce an increased depth of water, but the gravel which it scours out will be deposited below, and may make another shoal as bad as the original.

Surveys were made of the following-named bars of the river, fix: Bower's Bar, Humphrey's Rapid, Chitwood Bar, Beaver and Lone Tree Rapids, and Matheney's Bar. Maps of each of these bars accompany this report. They will not be described in the above order, commencing at

BOWER'S BAR.

This obstruction is three miles above Albany. The river suddenly widens from 225 feet to 400 feet, where the shoal is found. The distance from 3 feet depth of water above, to the same depth below the shoal, is 150 feet. Average depth of water on the shoal is 2 feet. The current flows nearly west, with a velocity of 400 feet per minute. Immediately above the shoal the current is less rapid. The bed of the river is gravel, averaging about 2 pounds in weight; some of them, however, weigh as much as 20 pounds. Near the shoal are three bare gravel-bars, two of them on the north side of the channel, the other near the mouth of the creek on the south side of the channel. The lower of these bars is gradually washing away on the channel side. The south bank of

the river is clay, stands nearly vertically, and is also gradually wearing away. The north bank is a gravelly shore, having a gradual slope from the water's edge for a distance of about 200 feet. Beyond that we find timber. The river can be improved here by building a wing-dam from the foot of the northerly gravel-bar to the head of the lower bar. This would be 325 feet long, would concentrate the current, and cause it to scour the shoal, but would also undermine the south bank and cause it to wash. This can be remedied by piling close to shore, and then throwing in logs and brush behind the piles; 500 linear feet of piling would probably suffice. The estimated cost of the wing-dam is $900; that of the bulk-head for shore protection, $2,600, making a total estimated cost of this improvement, $3,500.

After leaving Bower's Bar, we pass down the river without meeting with any serious obstacles until we arrive at

HUMPHREY'S RAPID.

This obstruction is about twenty miles, by river, above Salem. The bed of the river is gravel, like that on the other shoals, but the obstruction consists of two rocky reefs, nearly parallel to each other, about 150 feet apart, putting out from opposite sides of the channel. The lower one projects from the south shore, and is 125 feet in length, but an average width of 75 feet. The upper reef puts out from an island on the north side of the channel for a distance of 250 feet, and has an aver-

age width of 100 feet. These two obstacles cause the boat, in ascending or descending, to make two sharp turns in contrary directions, (like the letter S,) and the current being rapid, (nearly 400 feet per minute,) has a tendency to throw a boat, in crossing, broadside on the lower reef, which is covered by about 2 feet of water. The upper one is barely covered. A channel can be made by blasting through either of these ledges of rock, but the work would be very expensive. An equally good channel, at a small cost, can be made between the island and the north shore. This chute contains an average depth of 15 feet of water, except at its upper end, and for a distance of 300 feet, where there is less than 3 feet of water. This shoal, however, is all small gravel, none of it any larger than an egg; and if a wing-dam 220 feet long was constructed diagonally across the current, its lower end abutting against the head of the small gravel bar near the head of the island, the increased current would soon scour out the small gravelly shoal, and give a channel 75 feet wide in its narrowest part.

At the end of the island was an immense accumulation of drift, probably 20 feet high, which lodges there during every freshet. This was set fire to and burned out in a few days. The only objection to building a dam at the head of this bar is, that it might catch the drift and choke any channel which it might form. This is not probable, because the gravel-bar against which the dam would abut is about 3 feet high, whereas the top of the

dam would be but a few inches above the water surface. The estimated cost of building this dam—220 feet in length—is $700.

The next important obstruction below this is called

CHITWOOD BAR.

This is about a mile and a half below Salem, and gives the steamboat men considerable trouble during low-water stage of the river. The river contains a long gravel-bar or island, the foot of which is about 600 feet above the shoal. At the shoal the river widens suddenly from 300 to 675 feet. Immediately above and below the shoal is a good channel, carrying upward of 3 feet of water. Length of the shoal between the 3-foot curves, above and below, is 475 feet. On the west bank, a little above the shoal, is a wing-dam 150 feet long; another was built from the foot of the island, and is 550 feet long. The shoal commences at the foot of the long wing-dam, and extends across the river, covered with from 20 to 30 inches of water, In the prolongation of the shorter wing-dam, and distant from its foot about 140 feet, is a pile driven into the gravelly bed of the river. In ascending the river, the boats hug the west bank until they arrive about 150 feet below the wing-dam; a line is then taken from the boat and one end made fast to the pile, the other end remaining on board wound around the capstan. The boat then backs; the result is, that she is carried into midstream, and held there by the line. The Engine is then quickly reversed, a few feet of progress

made, and the spare line taken in. The probabilities are that by this time the boat is aground. She again commences to back, which throws a little water under her, and causes her to raise a trifle on the wave so produced. The engine is again quickly reversed, and more progress made. This process is repeated, sometimes for hours, until the boat reaches the pile, after which she has no more difficulty. While surveying this bar, a break 100 feet long occurred in the long dam near the foot of the island. The water, which was 2 feet deep before the break, soon increased to 8 feet depth. A good channel can be made through the break of this dam by throwing a dam 200 feet long from the west bank, 500 feet above, and parallel to the one already built on this bank. The lower dam should also be lengthened 200 feet. The channel would then be on the east side of the river, until, crossing through the break of the long dam, we would again arrive in deep water, in the old channel above the shoal.

The estimated cost of this improvement is $1,400. The east bank would also have to be protected by a bulk-head of piles and logs. This is estimated at $2,600.

Leaving Chitwood Bar, we pass down the river nine miles, and reach

BEAVER AND LONE TREE RAPIDS.

* * * * *

STATE'S EXHIBIT 114C

52d CONGRESS, 2d Session.) HOUSE OF REPRESENTATIVES. (En. Doc. 1, (pt. 2, (vol. II.

ANNUAL REPORT
OF THE
CHIEF OF ENGINEERS,
UNITED STATES ARMY.
TO THE
SECRETARY OF WAR,
FOR
THE YEAR 1892.
IN FOUR PARTS AND ATLAS.
PART III.
WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1892.

(Pages 2847 through 2850)

* * * * *

SURVEY OF WILLAMETTE RIVER NEAR CORVALLIS, OREGON.

UNITED STATES ENGINEER OFFICE,
Portland, Oregon, October 30, 1891.

GENERAL: The river and harbor act approved September 19, 1890, provides that an examination and survey be made with the view to improving the navigation of the Willamette River, near the city of Corvallis, Oregon, and also that an estimate of the cost of the necessary improvement be submitted. This duty having been

assigned to me by your letter of October 21, 1890, I now have the honor to submit the following report* thereon:

*Map accompanying this report not printed.

(Ex 114C p 2848)

The reach of river deemed necessary to be surveyed in order to arrive at a proper conclusion as to what should be done in this case extends from a point 2 miles below Corvallis to a point 5½ miles above, measured in a straight line. By the meanderings of the present steamboat channel the distance between these extreme points is 13 miles. The average low-water slope throughout this reach is 2.44 feet per mile. The slope at high water is 2.36 feet per mile. Throughout a portion of the distance above Corvallis the low-water discharge is divided between three channels, and during the extreme high water the whole valley, with the exception of a few isolated patches, is overflowed. The least distance between banks not overflowed within the limits of the survey is 2½ miles. The high bank opposite Corvallis is 6 miles distant. The bottom is cut up with sloughs, high-water channels, and old river beds, that serve as outlets for the water at medium and ordinary high-water stages. A portion of the bottom is covered with a thick growth of timber and underbrush, and another large portion on a little higher level has been cleared and is under cultivation. The soil here is rich and brings forth abundant crops when they can escape overflow.

These lands are subject to overflow at stages ranging from 12 to 20 feet above the low-water stage of the river. The extreme high water of February, 1890, reached 29 feet.

Before these bottom lands were cleared and placed under cultivation the heavy timber and underbrush with which they were covered retarded the water during the periods of their overflow and prevented the washing away of the soil. At the medium and low stages of the river, when it was confined between its banks, the erosion of these banks was limited, on account of the hard nature of the substratum on which the soil rests. This in general is compact gravel or a mixture of clay and sand, offering considerable resistance to the erosive action of the water. At places the soil or sand more loosely formed will extend below low water. When the land is cleared off and the soil loosened up by cultivation the high-water currents have a more marked effect upon the top layer of soil. The damage is greater and more noticeable as the country becomes more settled and more of the ground is brought under cultivation. This land is not overflowed every year; sometimes a period of six or eight years may elapse without a serious flood. Its exceeding great productiveness induces the farmer to take these chances.

In the reach of 3½ miles from Corvallis upstream the river makes a well defined S. In the upper curve of this S it has been slowly eroding its banks, making the

curve deeper. Plotting the original meander notes made in 1852, obtained from the surveyor-general's office, on our recent map, it appears that the apex of the concave bank has advanced 7775 feet, or at the average rate of 20 feet per year. The land that has been washed away amounts to 54 acres. The value of this at present prices should not exceed $2,000.

In this locality we find several low places in the land, through which high water escapes across the neck into the river below. Some alarm has been felt lest the whole body of the river might break through here and leave Corvallis some 4,000 feet from the navigable channel of the river. The river and harbor act of 1888 authorized the expenditure of $14,000 in revetting this bend to prevent the threatened change of channel. The bank was graded down to a slope of 1 on 2 and revetted with brush and rock over a width of 18 feet for a distance of 1,676 feet. This effectually protected this portion from further erosion and is still in good condition. In addition to this there was a row of piles 6 feet apart driven on the top of the bank a short distance back from the edge

(Ex 114C p 2849)

with the view to catching drift and checking the velocity of the water when it reached the overflow stage, the idea of this being to assimilate the conditions existing before the trees and underbrush were cut away. The effect of the high water of February, 1890, upon this and the resulting scouring action of the water in its immedi-

ate vicinity, were not such as to warrant the further construction of works of this character. Above the upper end of the reveted portion of the bank there is a hard gravel beach for a distance of about 1,400 feet. This extends back from low water from 50 to 100 feet; then comes the bluff soil bank from 8 to 10 feet high, eroded more or less at high water. In this locality is the head of a low place in the land through which the water flows at ordinary high stages. Above this for a considerable distance the same gravel bed seems to underlie the bluff bank and protect it from erosion except at the higher stages of water. The profile along this low swale shows that the water commences running through it at a 10-foot stage. At that stage the water is 2½ feet above the top of the bank across the lower end of the slough and is backed up to within about 1,700 feet of the point of overflow at the upper end. The fall is then 10 feet. At the low-water stage the surface of the water in the river is on a level with a point 3,500 feet below the head of the swale. This seems to be filled about the head with course heavy material brought in during high water. The evidence that this is enlarging or growing deeper is not conclusive.

The total amount expended by the United States in protecting this bend was $12,496.

From a study of the results of this survey and a personal visit to the ground during high water and again at low water, I can not conclude that there is any dan-

ger that the channel of the river at low water will pass over this neck within any reasonable time in the future, or that the city of Corvallis will be deprived of its advantage of water transportation. At high stages of the river the water will continue to pass over these bottom lands as it has done in the past, and no amount of money within reason will prevent it.

The present condition of the river in this vicinity as regards navigation may be classed as very good when compared with many other localities along its course where no improvement is contemplated.

In the first bend above Corvallis we find the lower end of a chute that leads across a narrow neck to the river above. The length of this is 3,600 feet. At a 5-foot stage the water commences to run through this chute. The difference of level in the river at this stage between the head and foot of the chute is 8 feet. It is at present very much obstructed with fallen trees and driftwood. If this were cleared out and the trees and underbrush along its banks cut down for some distance back, it would gradually enlarge and serve as an escape during ordinary high stages for a large portion of the water that now passes down around the bend and over the bottom land in front of Corvallis. This fall of 8 feet in a distance of 3,000 feet will give a very swift current through the chute when it is cleared of the obstructions that now encumber it. The sand and gravel at its head may be expected to be washed away and in time the

low-water flow of the river may take this course. This will produce a radical change in the regimen of the river in this vicinity and give great relief to the bend below. Navigation during the low-water stages will probably not be so convenient when this takes place as at present, but in time as the head of the slope is washed down it will be less steep and the velocity of the water diminished.

(Ex 114C p 2850)

To the extent of clearing out this chute as indicated above I recommend that work be done in this locality, and estimate the cost of the improvement at $5,000.

Very respectfully, your obedient servant.

THOS. H. HANDBURY,

Major, Corps of Engineers.

* * * * *

STATE'S EXHIBIT 115

|Certificate omitted in printing|

* * * * *

ANNUAL REPORT
OF THE
CHIEF OF ENGINEERS
TO THE
SECRETARY OF WAR
FOR
THE YEAR 1875.

IN TWO PARTS.

PART II.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1875.

(Pages 760 through 768)

G G 2.

IMPROVEMENT OF THE WILLAMETTE RIVER ABOVE OREGON CITY, OREGON.

The report in regard to this improvement for the fiscal year ending the 30th of June, 1875, is respectfully submitted. The operations consisted in the removal of snags, roots, rocks, and overhanging limbs of trees, with such other obstructions to the navigation of the river as were deemed necessary. These were all executed by

the United States snagboat, manned by a master and a crew of seven men under the employ of the Government. In a great many cases giant-powder was successfully used in blowing to pieces and loosening such snags as were deeply embedded in the gravel or sand, and which resisted the power of the boat. She was amply supplied with the usual mechanical appliances of derricks, capstans, gearing-tackle, and a full assortment of all necessary tools for the performance of the work. The machinery was worked by hand. The boat was either warped from point to point at the scene of her labors, or between distant points was towed by the steamboats plying regularly on the river. As the appropriation for the fiscal year was so very limited, no additional improvements could be attempted with a view to deepen the bed at many points where bars and elbows exist, by either the dredging process or by the construction of wing-dams, or by longitudinal dikes for the establishment of uniform channels, made of continuous piles, backed by heavy timbers. Many useless sloughs, however, were closed by cutting trees across them, and damming them by floating drift, in order to increase the volume of water in the main channel. The following is a brief synopsis of the work performed, prepared from the monthly reports for the year:

1874. *July.*—Snag-boat, after being thoroughly calked and painted, was towed to Jarvis' Slough on the 15th of July. Thirty snags were removed at this place, many

of them by the aid of giant-powder, averaging from 30 to 150 feet in length and from 1 to 5 feet in diameter.

August.—Snag-boat still continued to work at Jarvis' Slough for a time, and during the remainder of the month opposite to Wheatland. Fifty snags and stumps were taken out, at an average of 75 feet in length by 6 in diameter. Many of these trees were so long that it became, in many instances, necessary to saw and cut them into from four to nine pieces. Giant-powder was found to be indispensable for the removal of stumps where firmly embedded, which was frequently the case in the bottom of the river, and considered dangerous obstructions to navigation.

September.—Snag-boat was engaged between the 1st and 12th of the month in removing snags, stumps, and rocks from the following localities: Gate's Bar, Jackson's Warehouse, Five Islands, Davidson's Landing, and Champoeg. Seventeen snags and stumps were removed from these several places, their total length being over 1,000 feet, with an average of 7 at the butt. This being completed, operations were commenced at Rock Island on the 13th. Capstan was repaired and drills sharpened. Floating stage was also prepared and work begun on the rocks. A bowlder among the Taulitan rocks, 6 feet in diameter, was also blasted and displaced from the channel.

October.—From the 1st to the 14th of the month the snag-boat remained at Ash Island, removing forty-two

snags, ranging from 20 to 200 feet in length and in diameter from 1 to 4½ feet. Thence she was towed to Carey's Bend, where she lay until the 20th, displacing twenty-

(Ex 115, p 761)

two snags of from 20 to 90 feet, some of which were deeply embedded in the gravel, and consequently very difficult to remove. On that day she reached Weston Bend and took out thirty more; it was there necessary to use the powder. On the 27th she arrived at Bennett's Dread; at this place three large stumps were blasted to pieces, and twelve trees cut down from off the land which raked the cabins of passing steamers as they hugged the banks to avoid the currents. The boat was then dropped down to Chrisman's Bar, where eight snags were pulled out.

November.—Work was continued at the same locality for a few days. Thence the boat was temporarily dispatched to the mouth of the river to remove some dangerous snags which had lodged across the only channel for ocean-steamers and sailing-vessels. She arrived there on the 7th, and continued operations until the 25th. Subsequently, a very long snag was dragged out and cut to pieces from the channel and anchorage in front of Portland.

Thirty-two large trees and stumps were removed from the mouth; of the former the largest was 180 feet in length and 16 feet in circumference at the butt. The boat was then towed to Canemah, about two miles above

Oregon City, at the falls of the Willamette, where she was temporarily laid up for the winter and the crew discharged.

December.—No work accomplished on account of high water in the river. During this freshet many new snags became lodged in the channel, rendering navigation dangerous and difficult.

1875, *January.*—Operations were still suspended for the same cause. The steamers Shoshone and Albany were snagged, and nothing but the machinery saved from the wrecks. On the 2d of the month, the following report was rendered by Capt. James Wilson, pilot of the Governor Grover, as to the localities and numbers of snags which had lodged in some of the most dangerous places during the winter high waters:

	Snags		Snags
At Ash Island	4	Turntable	8
Weston	1	Peoria	5
Bennett's Dread	1	Mouth of Long Tom	4
Five Islands	2	Eagle Bend	1
Mouth of Danger Slough	1	Corcovan Root	5
Bitterman's Bend	9	Hamilton Warehouse	2
Buena Vista	6	Irish Bend	6
Spring Hill	3	Monroe Landing	10
Between Albany and Corvallis	15	Spelling's Fish Bend	6
Mouth of East Channel	5	Elfin's Chute	5
Booneville Slough	12	Harrisburg Bend	12
Raft snags	4	Total	127

Between Harrisburg and Eugene City they were too numerous to count.

February.—On the 8th of the month the crew of the snag-boat was again shipped.

On the 9th and 10th she was towed by one of the

river-steamers to Salem, to attempt the removal of a large snag near that place, the same upon which the Shoshone had been sunk a few weeks before. On the 11th she worked with success in pulling it out, but the steamer proved to be too badly damaged to attempt to do anything for her in the way of repairs and she was consequently abandoned, after her machinery had been removed. On the 12th, the snag-boat was towed up past Albany to Magoogalon's Slough, where four snags of the usual dimensions were displaced. Subsequently she was taken up on the 13th, and commenced operations at the mouth of Booneville Slough, four miles above Corvallis. At this locality, during the remainder of the

(Ex 115, p 762)

month, one hundred and ninety-three snags, from 150 to 30 feet in length, the majority of them very long, were removed, cut up, and thrown on the bank, completely out of the way, on account of the narrowness of the channel; it is two miles long, and full of obstructions throughout its entire length.

March.—The snag-boat continued operations at Booneville Slough until the 8th of this month, during that time disposing of thirty additional snags. On the 9th, she was taken up to Turntable, at the head of Big Island. This is a peculiar elbow, where the channel takes a sudden bend; a boat in descending at high water, first runs into the righthand channel for a short distance, then, after making a complete rotation, shoots back into

the left one before resuming its course. Forty-eight snags were pulled, all averaging about the same dimensions as at previous places. On the 20th, the snag-boat arrived at Peoria; at this place seventeen snags were taken out from a new chute, which has been used by steamboats since the closing of the east channel. Many overhanging trees were cut down. On the 25th, she reached Wilson's Chute. On account of a rapid rise in the river at this time, the water assumed a very muddy appearance, and it became impossible to see the snags. The masses of drift from above also endangered the boat so that her position had to be shifted to secure her safety. Very little work was, in consequence, accomplished at this place; it was found necessary to postpone it until a more favorable time should offer during the down trip. On the last day of the month the snag-boat was towed up to Harrisburg Bend.

April.—Operations were commenced soon after the beginning of the month; the boat had to be shifted often on account of drift-wood, much of which was caught and used for filling up the mouths of useless sloughs. In consequence of the rise in the river from the melting of the snow in the mountains, and the effect of the warm weather, which had been recently experienced, the work with the snag-boat was frequently suspended. On such occasions the men were engaged on a large drift formed at the head of Wilson's Slough—working, with the skiff, lines, axes, and saws, Spanish windlass, and

small tackle, by hand. During the month forty trees and stumps were removed at Harrisburg Bend from the small and large sloughs, and two hundred similar obstructions from the head of the chute. The deck of the boat and the sheers of the hoisting-apparatus were painted during the time she was not otherwise employed. On the 26th, she was lined up part of the way to Harrisburgh. The mouths of three sloughs near that place, which carried off a large body of water from the main channel, were filled with drift and closed.

May.—Work was continued at Harrisburg Bend for the first six days of this month, during which time twenty-six snags were removed—all that could be seen above the surface of the water. It was then necessary to suspend further operations, on account of high water and its muddy condition. It had commenced to rain very hard much earlier than was anticipated. Between the 24th and 29th, the master and crew were detached from the snag-boat and directed to assist the steamer Ohio in cutting her way through a drift-pile in a new chute, afterward known as the Ohio Chute, which the river had recently opened for itself. Between two sucessive trips of the steamer the old channel had become almost dry and useless, only one out of the many hundred freaks of the same nature caused by the velocity of the current receiving some sudden check from newly-accumulated drift or rafts. Upon returning to the snag-boat several more snags were removed, the water having become

clear and low. The river was found to be full of obstructions between Corvallis and Harrisburg, and its condition far worse between the latter place and Eugene City.

June.—On the 4th of this month the snag-boat drifted down to Ingram's Bend, and subsequently to Alpin's Chute, a mile below the former, and about the same distance above Wilson's. From these two localities one hundred and thirty-five obstructions were removed; stumps and snags from 180 to 30 feet in length, and in circumference from 4 to 19½ feet. A great portion of these were deeply imbedded in the center of the steamboat channel; oftentimes the entire bodies of the trees would be covered by gravel, with nothing but a single root standing erect to bid defiance to passing boats. A great deal of difficulty was experienced in getting hold and displacing them. During the last two months good work was accomplished; two new chutes, Alpin's and Wilson's, each about a mile in extent, had been opened, in addition to a great improvement effected in the sloughs at Harrisburg Bend. Steamers could no longer run the old river, from the many sudden changes in its channel, and which were constantly occurring; these works consequently became a necessity, whilst at the same time the distance was shortened about two miles.

The trunks of trees of which the snags are composed are principally cottonwood, maple, ash, and willow.

From the above monthly details some conclusions may be reached as to the amount and character of a certain class of work to be annually executed, as long as the banks remain so densely covered with timber and subject to the powerful effects produced by the great volumes of water which will seek an uninterrupted passage to the open sea. Before submitting, on the 22d of May, the project for the continued prosecution of the improvement of the Upper Willamette during the current year, it was found impracticable to make a careful and precise examination of that portion of the river which extends between Oregon City and Eugene City, and for which the appropriations of $25,000, in currency, by the act of Congress approved March 3, 1875, was specially intended. The unusually high stage and muddy appearance of the water precluded any intention of the kind, although anxiously desired. It had also been ascertained that many new chutes had been forcibly cut at many unexpected and undesirable points, and that serious departures had been effected from the channel of the previous year. The time had not been propitious for several months for the purpose of ascertaining the exact nature of the work to be accomplished. It was desirable to make an inspection at the lowest stage of water to view the river at its worst possible phases. The office was constantly advised by the master of the snag-boat as to its condition. On the last day of March the Willamette had risen 7 feet above low-water, the high-

est mark reached at any time during the four previous years—so high as to render it unsafe and risky to venture with the boat into the channel, owing to the number of floating logs and large trees displaced from the banks. The water was also so thick with mud as to render it impossible to discern the positions of snags below its surface. Its appearance indicated that great damage must have been done by the washing away of the banks at points on the upper river. It was not before the week commencing on the 6th of June that all the conditions of low, clear water and suitable light-draught steamboats between intermediate points were favorable for a detailed examination in person of the regimen of the river. The ascent was necessarily slow, and the trip almost entirely performed by daylight, so that, through the politeness and knowledge of intelli-

(Ex 115, p 764)

gent pilots, the nature of the obstructions to navigation were made plainly discernible; the extent, depth, and general character of the many bars and shoals; the localities where generally occur the lodgments of rafts, drift, snags, stumps, and roots during each successive annular winters-freshet; the positions of ledges of rocks and bowlders—all were made apparent, and a proper understanding and appreciation of the necessity of the improvements was attained by an actual observance and study of the subject, made under the most favorable circumstances. The result of this reconnaissance was the

preparation of a project for the further prosecution of the works of improvement on the Upper Willamette, confirmatory to a great extent of the one previously submitted. It comprises not only the specifications for the construction of wing-dams or longitudinal dikes, for narrowing, deepening, and rendering more uniform the channel, and at what particular localities, but also the displacement of such ledges of rock and bowlders as may be found to interfere with the safe passage of boats. For these specific purposes the larger portion of the appropriation will be allotted; the balance will be partly retained for the payment of the salaries of the assistant engineer in charge of the survey of the river, also of the location of the lines of work, and of his special party of subassistants, rodmen, flagmen, boatmen, and employes generally; for the employment of master and crew of the snag-boat engaged in the removal of snags, sawyers, stumps, and roots from the channel, and all incidental expenses relating to its repairs and its intended use; for the cost of material and supplies; for the purchase of small boats; for the rent of office; and for the employment of a superintendent of construction during the progress of the work, whose duty it will be to see that the contractors strictly and faithfully conform to each and all of the requirements of the specifications. It was recommended by this office, and authority subsequently granted by the Chief of Engineers for the purchase, that more suitable hoisting-apparatus be erected

on the snag-boat, comprising the necessary machinery, engine, and boiler, and also two capstans, with all gearing, shifting-levers, and connections, to be run by steam-power. It is estimated that more than double the amount of work can be accomplished in the same length of time that can be effected with the present slow process by manual labor. The engine will be a portable horizontal one, on an iron bed, with vertical boiler. The plan is for two capstans, which can be used either in hoisting or hauling the boat to and from position, or for lining up her up stream. The additional expense is nothing, consisting only in the employment of an engineer with an increased pay per month, compensated by the reduction in numbers of the old crew. Fuel is always readily to be had for the cutting. The usual expense of towage will have to be taken from the appropriation when necessary to move the snag-boat between distant localities, although the Willamette River Transportation Company have kindly offered, on different occasions, to attend her free from charge. The number of obstructions to be displaced cannot even be approximately ascertained, and consequently no direct contract could be judiciously made to meet the entire and constantly-changing features of the case. Even at this time it is not known what obstacles of that nature will have to be removed; and certainly there is no foretelling what may be required of the snag-boat after the occurrence of the annual freshets during the current fiscal year. The amounts to be re-

tained, as far as practicable, for the previously-enumerated cases, must be especially and solely assigned for those objects. The major part of the appropriation, as before stated, will be applied to the construction of suitable wing-dams or longitudinal dikes at the several lo-

(Ex 115, p 765)

calities where most needed, and in order to narrow and thereby obtain a greater depth of water and a more uniform steamboat-channel of the river. At the points where the work is to be executed, the bed of the stream becomes g e n e r a l l y very considerably widened out. There bars of gravel and sand are formed, which, at the time of an extremely low stage, are covered with but little water; in many instances not more than from 17 to 20 inches. This condition of affairs continues from about the 1st of July until the commencement, in the latter part of October, of the rainy season. Whilst making the examination of the river, between the 7th and 11th of June, both inclusive, the water at the time being very near its lowest stage, a great many rapids were passed between Oregon City and Corvallis, and the steamer Governor Grover often scraped the bottom on account of the shallowness of the stream. Between Corvallis and Eugene there were many more, upon which even the "Ohio," carrying about seventy tons, would occasionally stick, or drag very heavily over them. The latter was built to draw but 12 inches; but, being a propeller, drew, when moving, several more.

The localities of the dams and the section from which snags and other obstructions will have to be removed, extend along the river from Oregon City, at the Falls of the Willamette, to Eugene City, a distance approximately estimated, in the absence of actual measurements, to be nearly one hundred and ninety-five miles. The last-named place has been usually considered the head of steam-navigation for light-draught boats during average stages of high water, and only continuing for a few months of each year. Boats have ascended as high up as Springfield, some six miles above Eugene. The names of the localities along the river, at most of which it is proposed to confine operations for the current fiscal year, have been placed in a tabulated form. In this table the intermediate distances are given, the probable length of dams at each, and the places where the displacement of rock must be effected, together with such remarks as may be applicable to the subject, placed in a condensed form, and briefly descriptive of the character of the most dangerous difficulties to be overcome.

The estimate prepared and submitted in regard to the work to be performed during the current fiscal year was based upon personal examinations, and reliable information; and upon this representation the appropriation of $25,000 was made for the improvement of the channel. It was at the time intended that the construction of wing-dams should be confined to that portion of

the river between Oregon City and Corvallis, in addition to the removal of snags and other obstructions along the entire distance between the first named and Eugene City. Since then, after more extended examinations, no good reason has become apparent to justify a change in the plan then decided upon; on the contrary, the opinion then entertained is strongly confirmed. As the Willamette above Corvallis is cut up into so many useless sloughs, and at each liable to undergo very marked and frequent changes, it would be impossible to confine its waters in one main and permanent bed. New channels are not unfrequently cut out and old ones have been left nearly bare; the latter, after being closed for years are again reopened. The yielding nature of the soil cannot resist the action of the strong currents which strike the banks. The latter are low, composed of fine gravel overtopped with alluvial soil, and although covered with timber and thick brush to the water's edge, are easily washed out, or cut through as if they possessed only the consistency of sand. The river above Corvallis is very tortuous, at places very narrow, and runs at many localities with great rapidity. Only two large tributaries empty into the river below

Harrisburg, the Mary's River immediately above Corvallis and the Long Tom above Peoria. The river has but recently left its old bed and made a cut across a neck of land into the Long Tom, using the bed of the latter

stream in place of its natural one. Such changes are only too frequent. Three other streams—the McKenzie, the Middle, and the Coast Fork—unite below Eugene City, and form the main body of the river. The principal obstructions to navigation are found between Eugene City and Harrisburg, a distance of twenty-eight miles by the river. Between these two points there are eleven bars with from 10 to 12 inches of water at the lowest stage; wherever they exist the river is divided into two or more channels of about equal capacity, from 100 to 200 feet in width, and from 2 to 4 in depth. The bars extend entirely across the river. The volume of water is sufficient, if confined within one channel, to float boats of 3 feet draught at all seasons of the year. The fall is uniform, the only changes in the velocity being found on the bars, which are invariably near the head of the sloughs. Through the latter nearly, if not quite, one-half of the water is dispersed. The adjacent country, as well as the banks, is flat, from 5 to 8 feet above the line of low water; the river-bottom is from one to two miles in width, and the soil is nothing more than a bed of gravel of unknown depth, with a surface-layer of sandy loam from 1 to 3 feet in thickness. The timber, consisting of cottonwood, or Balm of Gilead, maple, ash, alder, and willows, is dense, and covers the whole bottom-land. The latter is traversed by sloughs and bayous, large and small; and in times of floods is covered with swiftly-running water to a depth of from 5 to 10 feet.

Several farms have been inundated and washed away, the river entirely devastating them by cutting a network of sloughs through their broad fields; the farmer along its banks cannot tell at what time his hundreds of acres may be swamped and disappear from his sight forever. Each year new channels are opened, old ones closed; new chutes cut, old ones obstructed by masses of drift; sloughs become the main bed, while the latter assume the characteristics of the former; extensive rafts are piled up by one freshet only to be displaced by a succeeding one; the formation of islands and bars is in constant progress where the velocity of the current receives a sudden check only to disappear at the very next high water. Captain Miller, one of the oldest and most experienced pilots in shoal waters of the same nature as the Willamette, has stated that he has never run the same channel for two consecutive years between Harrisburg and Eugene City. The map of the river, compiled from surveys made from fifteen to twenty years ago, a tracing of which is transmitted with this report, differs so widely from the present meanderings of the channel and its many sloughs along that section of the river to which reference is made, as to be of very little use in an examination for the purpose of projecting or devising a plan of permanent improvement. If any attempt of the kind should ever be made, it must be at an enormous expense of time and money; the small appropriations annually contributed for the purpose of

meeting the immediate exigencies of the case would soon be swallowed up in the whirlpools and eddies created by the rushing waters of the winter freshets. Even in the lower portions of the river it may prove a difficult matter at many points to construct wing-dams, on account of the great velocity of the water, and the temporary formations of eddies, and the consequent undermining of the piles during the progress of the work. Crib-work may then have to be substituted for piling. The only feasible and sensible plan in this case is the annual removal, by the snag-boat, of the snags and other obstructions, as they are brought down from above and

lodged on the bottom; together with the additional work of filling up as far as possible the heads of all useless sloughs. "Most rivers acquire in time a fixed regimen, although periodically, and sometimes accidentally, subject to changes from freshets caused by the melting of snow and heavy falls of rain." In the particular case under consideration it will be many years before any permanency can be effected; not until the dense growth of timber disappears from the banks, the cause of all the difficulties to be contended with even in the best-devised system of improvement, can any real and permanent good be accomplished. As an instance of the nature and suddenness of the changes in the Willamette between Harrisburgh and Eugene City, the following may be furnished as a fair illustration: The pilot and master

of the steamer Ohio, after having made but two favorable trips to the latter place during the first part of May, reported at the time to this office that "since the last one was successfully made," to quote his own expression, "our river has left Eugene." In other words, that, at a point about ten miles above Harrisburgh, the channel, facetiously styled by the pilots the "Grave-yard," the original old bed of the river which had been run for fifteen years, had become so low in the course of a few days as to be no longer navigable, even for that steamer with her very light draught; this too, at a time when she was favored with a high stage of water. It is six miles in extent, very narrow, crooked, and rapid. This condition of affairs had been occasioned by the river forcing for itself a new cut through a narrow strip of land, opening a chute six hundred feet in length and about forty feet in width at its narrowest place, clear of drift, with a fall in that distance of 3 feet, and nearly straight. A large raft had been lodged at the upper end of it, which impeded its passage.

The master of the snag-boat was directed to move at once, with a portion of his crew, to the obstruction, in order, with the assistance of the steamer's crew, to break it up and remove it from the channel. This was successfully accomplished between the 26th and 28th of May inclusive, during which time about twenty-two hours' work was performed. In consequence of the great fall, boats will have to be warped up and down. It has

been named the "Ohio Chute;" the distance saved by running it cannot be less than three miles. Subsequently, within a very short time after the first removing of the raft, and whilst making a personal inspection, the cut was found to have considerably changed by the washing away of the banks and the deposit of additional snags and stumps. The precaution had been taken to again carry up the master and part of the crew of the snagboat, with the necessary tools and a supply of giant-powder, to the scene of their previous labors, and it was fortunate that such a step had been taken. Another detention of seven hours occurred in the attempted removal of snags by the "Ohio;" but success only attended the application of a charge of the powder, by which they were displaced sufficiently to allow the boat to be lined past them. On her downward trip still another detention of several hours took place. Only two satisfactory results were obtained by the experience of this trip: In the first place, that a steamer of her build does not have the necessary stiffness for work of that class; nor is she possessed of sufficient power and the needed hoisting-apparatus to drag out or raise up, and then throw completely out over the bank, any snags of large dimensions to which she might tackle. In the second place, most of them cannot be pulled straight out by mere force, as the roots are generally so deeply embedded in the bottom; but the latter must be first loosened by blasting, and the trunk be then raised up and hoisted out perfectly

(Ex 115, p 768)

clear of the water, and afterwards cut into several pieces, so as not to again become an impediment in the channel. The case alluded to fully demonstrates the very sudden changes in the channel of the river; an old one used for many years suddenly becomes useless even at an unusually high stage of water; and a new one is opened, which has to be improved upon during each attempted trial of the boat to make the ascent, and then without any certainty of a successful or even a partially durable result. There can be no longer any doubt as to the fruitlessness of experimenting for the present upon any so-called permanent improvement along that portion of the river between Corvallis and Eugene City. The former place is scarcely out of sight before the difficulties commence; the river almost immediately above the town divides into two principal channels, known as the East and West Channels. The latter is the one now navigated, but the other is said to have plenty of water, requiring only the removal of snags and drift.

It will be ascertained whether it cannot be made navigable and useful, as it is shorter than the other by from two to three miles. No large rapid was found to exist, either by one of the assistant engineers of this office, Mr. Robert A. Habersham, who was directed to make an examination of the river, and from whose notes upon the same many items of useful information have been abstracted and incorporated in this report, or by the of-

ficer in charge during his personal reconnaissance made at a later period. The river appears along that section to be almost a continuous series of rapids, connected here and there by short, smooth sheets of water. All that can be done in the furtherance of any improvement will be to remove as rapidly, and as far as possible, according to the means at the disposal of the office, all such obstructions, of whatever nature they may prove to be, as will be encountered in any one of the new channels which the river shall in future be forced to make for itself. The construction of the wing-dams must, from necessity, be commenced at the lowest bars, along that section of the river more immediately above the falls, between Oregon City and Salem, to be continued thence up and along it to each of the several other points in their regular order of succession, preference always being given to those places where the channel contains the least depth of water and where the work is most needed. It would be useless to attempt anything in the upper portion of the river before the lower section has received attention. The great necessity of improving the upper river above Albany is very readily conceded, but it must not, however, be forgotten that to render any such improvements beneficial, if accomplished, it will be most important and necessary to attend to some other and very needed works lower down than that place. Lone Tree Rapid and Union Bar, below Salem, are known to be much worse obstructions than any others to be encountered in the river; from 17 to 18 inches can only be carried over them at low-water. These will, of course, have to be improved first, otherwise any contemplated works further up the stream need not be attempted. Already the greatest difficulty opposed to the navigation of the Upper Willamette, along its entire length, has been successfully overcome. A company, aided by the State, have built a canal and locks at the falls opposite to Oregon City, enabling boats to pass up and down without difficulty.

* * * * *

ANNUAL REPORT
OF THE
CHIEF OF ENGINEERS
TO THE
SECRETARY OF WAR
FOR THE
YEAR 1876.

IN THREE PARTS.

PART II.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1876.

(Pages 654 through 657)

F F II.

IMPROVEMENT OF THE UPPER WILLAMETTE RIVER, OREGON.

GENERAL DESCRIPTION OF THE RIVER.

The Willamette River rises in the Cascade range about 100 miles south of its junction with the Columbia, and cuts its way through a post-pliocene clay, in which are found remains of horse, mastodon, &c. Its important tributaries are the McKenzie and Coast Forks, the Long Tom Santiam, Mary's, Calapooya, Lackamute, Pudding, Yamhill, Tualatin, and Clackamas rivers. Its drainage-basin, including the watershed of its tributaries,

comprises an area of not less than 12,000 square miles.

The river-bottom is covered generally with heavy timber, principally cottonwood, maple, and ash, with thick undergrowth reaching to the edge of the high-water channel. Small tracts of cultivated land appear at intervals on the immediate banks, the houses of the settlers being situated generally a short distance back.

The bed of the river at its medium stage varies in width from 400 to 2,000 feet. During low water about one-half of its area is occupied by bare gravel-beds, covered in part by willow thickets, while the waterway varies in width from 150 to 1,000 feet. The depth at low water in the upper reaches of the river, above Corvallis, is from 12 inches to 12 feet; in the lower portion from 3 to 20 feet, while the width below Corvallis remains nearly the same throughout the year.

The steamboat channel, usually about one-fourth the width of the river, runs from side to side. The banks are generally vertical, from 5 to 10 feet and sometimes 20 feet high, and are of an alluvium formation. Rock occurs at some points. The bottom is gravelly, generally loose, but in some places cemented into hard-pan. Underlying the gravel, at depths varying with the localities, is the basalt common to this section of the country. As an obstruction this rock crops out at Rocky Rapids, Humphrey's Rocks, Eola Rocks, and Oregon City. It is easily drilled, blasts well, and is of good quality for masonry.

FLOODS.

The floods of the Willamette are caused by the rains, which occur between October and June. During their continuance the river maintains an average height of 10 feet above low-water mark. Excessive floods are rare, the highest recorded attaining a height of 30 feet above low-water mark.

At the commencement of the dry season, usually in May or June, the water begins to abate; falling rapidly at first, then more slowly, until it reaches the mean low stage, two months later.

Occasional heavy rains in the Cascade range maintain it at this stage until the beginning of the next rainy season; but should the summer be dry, as is generally the case, the water continues to fall, and reaches its extreme low stage about the month of August. No further change takes place until the winter-rain commences, which is usually in the latter part of October. The water during the lowest stage is very clear. At all other times it carries a considerable quantity of earthy matter. A portion of this is deposited in the deep reaches of the river, many of which, several miles in length, occur in the lower section, but the remainder is spread over the low bottom-lands, or transported to

(Ex 115, p 655)

the portion of the river below Portland, and deposited on the bars there, or discharged into the Columbia.

In the upper section of the river very little sediment is deposited, owing to the great velocity of the current.

HEAD OF NAVIGATION.

Eugene City, 172 miles from Portland, is the head of steamboat navigation on the Willamette. Boats drawing 30 inches loaded can now ply between Portland and Salem, a distance of 70 miles, at all stages of the river: between Salem and Corvallis, a distance of 44½ miles, at all times, except during very low water, or from November until July; and between Corvallis and Eugene City, a distance of 57½ miles, during the winter and spring rise, which generally lasts about six months. From Eugene City to Springfield, 6 miles above, occasional trips have been made during high water, but the total number accomplished thus far, I am informed, does not exceed ten.

For the further discussion of the river, we shall divide it into two sections.

1.—THE UPPER SECTION, FROM EUGENE TO CORVALLIS.

From Eugene City to Harrisburg, a distance of 23½ miles, the river falls 105.9 feet, or at the rate of 4½ feet per mile; below Harrisburg no levels have yet been taken, but from this point the rate of fall diminishes gradually and with tolerable uniformity to Oregon City, where a fall occurs of 41 feet in three-quarters of a mile. A canal with 4 locks was constructed here three years ago.

Between Eugene City and Corvallis the changes in the river, even within the last 20 years, have been very great, and river-pilots say that, in reaches from 5 to 10 miles in length, above Harrisburg, they have never run the same continuous channel for two consecutive seasons. The Willamette, in this section, receives but one tributary that affects its flow, namely, the McKenzie Fork, which enters it 9 miles below Eugene, and increases its volume about one-half. At several points above Corvallis, the river separates into two or more channels, and in one locality, known as the Devil's Graveyard, there are, besides two principal channels of nearly equal capacity, not less than 20 sloughs with running water. The result is, that for a distance of 25 miles the capacity of the river is reduced one-half, while the remainder of this section, about 32 miles, is much obstructed by bars and shoals, there being 30 in all between Eugene City and Corvallis, 26 of which are located above Harrisburg. These bars, composed of loose gravel, are constantly changing their form from the action of the current. Where the velocity is the greatest, pebbles from one-half to one inch in diameter have been observed on the crests of the bars moving down-stream at the rate of from 1 to 3 feet per minute, and during the survey last summer, the water being low, alterations thus produced in the shape of the bars were perceptible from day to day. This was at the lowest stage of the river; and as the same process goes on more rapidly during the

high stages, it is evident that maps showing the shapes of these bars would be of little value, when finished, in determining a plan of improvement.

The water in the river is sufficient, if controlled, to afford a channel for boats drawing 30 inches during at least eight months of the year—that is, at all times except during the lowest stage.

To do this it will be necessary to cut off all sloughs, and to confine

(Ex 115, p 656)

the river in the main bed. This can be done by proper dikes and dams, the materials for which are found in abundance in the vicinity.

The localities where the greatest waste of water occurs, and which should be first cut off, are as follows, proceeding from Eugene toward Corvallis: White's Rapids, Sawmill Bend, Trout Bar, Ohio Chute, Bromley's Bend, Alford's Chute, Wilson's Chute, Peoria, and Turntable.

Dams should be located at each of these places, and not more than 5 feet above low-water mark. It is not desirable to attempt to control the water after it has reached this height. The total length of the dams required for these sloughs will be about 6,000 feet. The further improvement of this section of the river will consist of building wing-dams near the bars, 20 in number, the unstable nature of which bars is such that no accurate estimate can be made of the cost. An approximate

estimate of the total length of the dams required will be about 9,000 feet. The approximate estimate of the cost of the improvement of the river, so as to obtain a depth of 30 inches between Eugene and Cornwallis (sic) during the ordinary stages of the river, or for at least eight months of the year, is as follows:

6,000 feet of cut-off dams, at $3	$18,000
9,000 feet of wing-dams, at $2	18,000
Contingencies, superintendence, engineering, &c., 10 per cent	3,600
Total	39,600

In addition to these troubles snags and drift-logs are numerous, and each high water adds to their number. Annual appropriations will be required to remove these, and will continue to be necessary until the axe of the settler or the erosion by freshets shall have removed the timber from the banks of the river.

The continual changes that are occurring render it almost impossible to prepare and submit a plan for the permanent improvement of this section of the river.

Up to this time the only work done above Corvallis consists of the removal of drift and snags at different points, the greater portion having been taken from Booneville slough, Peoria; mouth of the Long Tom,, Wilson's and Ohio Chutes, and Harrisburg bend.

2.—THE LOWER SECTION, FROM CORVALLIS TO PORTLAND.

Below Corvallis the general direction of the channel has not changed materially within a number of years. Boats drawing 30 inches loaded, owing to recent improvements, can ply between Portland and Salem at all seasons of the year, and between Salem and Corvallis at all times except during low water.

The difficulties in the way of navigation consist of numerous bars, some rock, and accumulations of drift and snags. Of these bars there are nine between Portland and Salem and 15 between Salem and Corvallis. Some of these can no longer be classed as obstructions, having been improved artificially or by changes in the bed of the river, but they are liable during any one season to return to their former condition, owing to the loose nature of the material of which they are composed.

During the summer of 1875 a survey of the river was made from Albany to Salem, and examinations made of the various bars in the remainder of the section under consideration. No survey has ever been made between Corvallis and Albany or between Salem and Portland, but the latter portion will be surveyed during the low-water season of 1876.

The following table exhibits the condition of the section between

(Ex 115, p 657)

Portland and Corvallis as near as can be obtained from the data at hand, the river having been too high since I have been in charge for careful personal examination.

* * * * *

Further careful examination must be made during

low water in July and August, 1876, and the survey of the river between Salem and Portland must be completed. Upon the result of this survey will depend the work to be done, and until it is made no definite estimate for the entire improvement of this section can be made. It is hoped that a depth of at least 3 feet can be obtained throughout the low-water season.

* * * * *

MEMORANDUM OPINION OF BENTON COUNTY CIRCUIT COURT

No. 21512—May 25, 1972

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512
	)	MEMORANDUM OPINION

This action was tried before the Court without jury on October 11, 1972. Leave was given each party to file proposed findings and written argument in lieu of closing arguments. The Court has considered the written materials submitted by the respective parties and has reviewed the evidence, and briefs submitted. The Court now finds as follows:

1. Defendant's Motion heard and argued on May 12, 1972, asking the Court to reconsider its previous rulings on pleadings is denied.

2. The State of Oregon acquired title to all lands within its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. Private ownership of the lands lying between the

> high and low water marks oi the Willamette River, must therefore be by grant from the State of Oregon. This acquisition of title by the State was by virtue of the State's soverignity [sic]. These lands cannot be sold, or otherwise disposed of, by the State so as to prevent their use by the public of the navigable waters for navigation and fishing. *Corvallis Sand and Gravel Company vs. Land Board* 250 Or 319, 333.

The ownership if any of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title. *State v. McVey,* 168 Or 337 345.

The Defendant did not acquire title by adverse possession or laches against the State. *Corvallis Sand and Gravel vs. Land Board,* supra. The evidence does not establish title to the lands by conveyance from the State.

The Defendant claims title to some of the lands under the Laws of 1874, p. 76, Sec. 1, which provided that title of the State to tide and overflow lands upon the Willamette River was granted to the owners of the adjacent lands. The act was repealed effective October 18, 1878. "Owners" as used in this statute refers to the grantees of the United States and their successors in interest. The 1874 statute did not grant or confirm title in the United States government to any parts of the beds of navigable waters in the State. *State v. McVey* Supra, 356.

Defendant's predecessor in title, entered upon Government Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He was entitled to a patent on July 8, 1880. The patent was received April 10, 1882. Defendant's predecessor in interest did not become an "owner" within the meaning of the 1874 statute before its repeal in 1878, nor did his patent convey to him any parts of the bed of the Willamette River.

Parcel 1

Defendant makes no claim to that portion of Parcel 1 which is located from the line described in "number one" on page 11 of Defendant's third amended answer. The line starts at the approximate southwest corner of Lot 10.

Prior to removal by dredging of large quantities of rock and gravel by a railroad in 1913, a large portion of what is described as Parcel 1 consisted of a formation known as Avery Bar. The Defendant alleges that Avery Bar was a point bar accretion to lands of which he is the grantee, to-wit, government Lots 10 and 11. The Court finds that this portion of the bed of the Willamette River is not a part of the Fischer Cut hereinafter to be discussed. The Court further finds that although Avery Bar originated as an island, it subsequently, but prior to 1913 by accretion became a point bar joined to the uplands. The Court finds that the accretion first joined the uplands at the ordinary low water mark, and that

the point bar then developed on top of the joinder. The State owned from the ordinary high water mark to the ordinary low water mark. The point bar, known as Avery's Bar accreted to land owned by the State. Parcel 1 therefore belongs to the Plaintiff.

Parcel 2 A, B, and C

The Court finds that the Willamette River was clearly coursing around Fischer Island, a peninsula-like formation, from 1853 to 1909. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed.

After a record flood on November 25, 1909, the Willamette River visibly changed its course from around Fischer Island to across its neck through Fischer Cut. In 1906 prior to the "break through" it was estimated that roughly one quarter of the flow of the river was carried through Fischer Cut which was dry at low water, or below the 5 foot stage, and carried only at intermediate or high stages of the river. In 1890, Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut channel in 1906 was in practically the same location as it was in 1890.

During the period intervening 1890-1909 the high water overflow did not clear Fischer Cut and the river continued to flow around Fischers Island. The event

when the Willamette River broke through Fischer Cut during the flood of November 25, 1909, was an event of common community discussion and the complete change of course shortly after its occurrence was observed by creditable witnesses including retired Circuit Judge Fred McHenry. The final action of the river was sudden and of such great force and violence as to convert Fischer Cut into the main channel of the Willamette River.

The change in course was not gradual and imperceptible as would occur in accretion or reliction. This was a sudden, rapid, and violent change of course, avulsive in character. The Court finds that the change of the course of the Willamette River from around Fischer's Island to through Fischer's Cut was an avulsive change, and that Parcels 2A, 2B, and 2C are owned by defendant.

Parcel 3

The Court finds that the portion of Parcel 3 downstream from the confluence of East River (prior to 1909, the Willamette River), which courses in part around Fischer Island, as measured by a line extended from the low water mark of the confluence extended across the Willamette River, lies within the bed of the Willamette River, and that the River has coursed over this portion in substantially the same manner since 1853. The Court finds that this portion of Parcel 3 is owned by Plaintiff. Parcel 3 is a part of Lots 11 and 12, Section 1, which was

the subject of a patent prior to 1878. Defendant's predecessor in title under the 1874 Act was owner to the low water mark of the Willamette River as it coursed around Fischer's Island. That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River in now named East River. Defendant therefore is owner of that portion of Fischer Cut upstream from the confluence of East River below, or upstream, as measured by a line extended from the low water mark of the confluence extended across the Willamette River. The remainder of Parcel 3 is owned by the Plaintiff.

Parcel 4

The Court finds that a substantial part of Parcel 4 now under water was in the bed of the river below the low water marks prior to the construction of a wingdike in 1948. This accreted formation, whether it be an island or point bar joined to the upland, was formed upon the bed, or accreted and joined the upland beginning at the low water mark. In either event it became a part of the land owned by Plaintiff, that is, the bed of the river between high and low water marks. Thus it is not material to ownership whether the accreted mass became covered with water from whatsoever cause be it the wingdike or the dredging of Avery Bar by the railroad in 1913-14.

Parcel 5

The Court finds that Parcel 5 is in the bed of the River between the lines of high and low water and that the Defendant's predecessors in title acquired no right therein by the Act of 1874. Parcel 5 is owned by Plaintiff, to the extent that it lies below the high water mark.

Parcels 6 and 7

The Defendant's predecessors in title of Parcels 6 and 7 acquired no right therein by the Act of 1874. Further the Court finds that Parcels 6 and 7 are not within the avulsive channel of Fischer Cut. The ownership of Parcels 6 and 7, including Avery Bar, or the railroad bar, within the lines of high and low water is in the Plaintiff.

Parcel 8

The Court finds Parcel 8 to be a point bar, joined to the uplands above the low water mark, and that the uplands were patented during the effective period of the 1874 statute. The Court finds Defendant to be the owner of Parcel 8.

Parcel 9

Defendant makes no claim to Parcel 9.

HIGH AND LOW WATER MARK

The Court finds that the ordinary low water mark at the guage at the City of Corvallis Water Treatment Plant is 197.4 feet above mean sea level, and from this point downstream, the ordinary low water mark drops an average of .9 feet every one-quarter of a mile.

The Court finds that the ordinary high water mark beginning at the location of the guage of the Corvallis Water Treatment Plant is 207.4 feet above mean sea level and from this point downstream, the ordinary high water mark drops an average of .9 feet every one-quarter of a mile.

DAMAGES

The Court finds as follows:

1. Plaintiff is entitled to recover damages for the period of six years immediately preceding the filing of the original complaint herein, and to date.

2. The Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

The Court finds as follows:

1. 574,000 cubic yards of minerals were removed from Parcel 1; 56,000 from Parcel 3, in addition to that covered by the lease; no material from Parcel 4; 9,000 from Parcel 5; 21,000 from Parcel 6; none from Parcel 7, for a grand total of 660,000 cubic yards.

2. That the Plaintiff is entitled to recover damag s of a total of $82,500.

3. The Court finds that the damages are unliqui-

dated and that Plaintiff is entitled to interest only from date of judgment.

Plaintiff may submit findings of facts and conclusions of law accordingly.

Dated this 25th day of May, 1972.

RICHARD MENGLER
Circuit Judge

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUPPLEMENT TO COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board,	)	
Plaintiff,	)	No. 21512
v.	)	FINDINGS OF FACT AND
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation,	)	CONCLUSIONS OF LAW
Defendant.	)	

A. **Finding of Fact**

The Willamette River was a navigable river at the time of Oregon's admission into the Union in 1859, and is now navigable, in that section of the river between its confluence with the Mary's River and upstream to the present site of the City of Corvallis Water Treatment Plant.

B. **Conclusions of Law**

The State of Oregon acquired title to all lands with-

in its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. This acquisition of title by the State was by virtue of the State's sovereignty. Private ownership of the lands lying between the high and low water marks of the Willamette River, must therefore be by grant from the State of Oregon. These lands cannot be sold or otherwise disposed of by the State so as to prevent their use by the public of the navigable waters for navigation and fishing.

The ownership, if any, of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title.

II.

A. **Finding of Fact**

Defendant did not acquire title to any of the property in dispute by a conveyance from the State of Oregon.

B. **Conclusion of Law**

The defendant could not acquire title as against the State of Oregon to any of the property in dispute by adverse possession or laches.

III.

A. **Finding of Fact**

Defendant's predecessor in title entered upon Government Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He became entitled to a patent from the United States on July 8, 1880. The patent was received April 10, 1882.

B. **Conclusion of Law**

Defendant's predecessor in interest did not become an "owner" of Government Lots 9, 10 and 12 within the meaning of laws 1874, p. 76, prior to the repeal of such law on October 18, 1878, by laws 1878, pp. 54-55, nor did his patent convey to him any part of the bed of the Willamette River.

IV.

A. **Finding of Fact**

1. Ordinary Low Water Mark

(a) The elevation of ordinary low water mark is 197.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream the ordinary low water mark drops an average of 0.9 feet every one-quarter of a mile.

2. Ordinary High Water Mark

(a) The elevation of the ordinary high water mark is 207.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream, the ordinary high water mark drops an average of 0.9 feet every one-quarter of a mile.

V.

Parcel 1

A. **Findings of Fact**

1. Parcel 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant and its downstream limits coinciding with the upstream limits of Parcel 2A.

2. Defendant disclaims any interest in that portion of Parcel 1 upstream of a line commencing at the approximate southwest corner of Lot 10.

3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10.

7. Thereafter, a point bar developed on top of the joinder.

8. Thereafter, the railroad in 1913 removed most

of the bar by dredging large quantities of rock and gravel.

9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10.

10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914.

B. **Conclusion of Law**

Plaintiff owns Parcel 1.

VI.

Parcels 2A, 2B, and 2C

A. **Findings of Fact**

1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer

Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut.

B. **Conclusion of Law**

Defendant owns Parcel 2A, 2B and 2C.

VII.

Parcel 3

A. **Findings of Fact**

1. Portion of Parcel 3 below confluence of East River.

(a) Parcel 3 lies in the bed of the river between ordinary low water marks.

(b) The portion of Parcel 3 downstream from a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) extended across the Willamette River, lies within the bed of the River over which the river has coursed in substantially the same manner since 1853.

2. Portion of Parcel 3 upstream of confluence of East River.

(a) This portion of Parcel 3 is a part of government lots 11 and 12, Section 1, which lots were patented prior to 1878.

(b) Defendant's predecessor in title under the laws of 1874, p. 76, owned to the low water mark of the Willamette River as it coursed around Fischer's Island.

(c) That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River is now named East River.

B. **Conclusion of Law**

1. Plaintiff is the owner of that portion of Parcel 3 below the confluence of East River as delineated by a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) across the Willamette River.

2. Defendant is the owner of that portion of Parcel 3 upstream from the line extended from the low water mark of the left bank of East River across the Willamette River.

VIII.

Parcel 4

A. **Findings of Fact**

1. Parcel 4 is an accreted formation lying on the right bank of the Willamette River just downstream from the City of Corvallis Water intake structure. The riverward boundary of this parcel is the ordinary low water line as defined by the court. The landward boundary line is the ordinary low water line as it existed around a portion of this parcel in July of 1969 and extended around the remainder.

2. A substantial part of Parcel 4 was in the bed of the river below low water marks prior to the construction of a wingdike by the Army Corps of Engineers in 1948.

3. This accreted formation originated in the river bed as either an island or a point bar, below the lines of ordinary low water.

4. This accreted formation rose from the bed and joined the upland at low water marks along the right bank.

5. The accretion was the direct result of the construction by the Corps of Engineers of a wingdike in 1948 which was placed on the island or point bar prior to its joinder to the upland.

6. Since the accretion originated from the state

owned bed below the lines of ordinary low water, it belonged to the state.

B. **Conclusion of Law**

Plaintiff owns Parcel 4.

IX.

Parcel 5

A. **Findings of Fact**

1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.

2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76.

B. **Conclusion of Law**

Plaintiff owns that portion of Parcel 5 which lies below the ordinary high water mark.

X.

Parcel 6

A. **Findings of Fact**

1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 6 is not within the avulsive channel of Fischer Cut.

3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 6, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

XI.

Parcel 7

A. **Findings of Fact**

1. Parcel 7 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 7 is not within the avulsive channel of Fischer Cut.

3. A portion of Parcel 7 occupies submersible lands in front of government lot 12 of section 12. The remaining portion of Parcel 7 was not riparian prior to the repeal of laws of 1874, page 76, by laws of 1878, pages 54-55.

4. Therefore, defendant's predecessors in title acquired no right therein by virtue of the laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 7, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

Parcel 8

A. **Findings of Fact**

1. Parcel 8 was a point bar, joined to the uplands above the low water mark.

2. The uplands were patented during the effective period of laws, 1874, p. 76.

B. **Conclusion of Law**

Parcel 8 belongs to the defendant.

Parcel 9

A. **Findings of Fact**

1. Defendant disclaims any interest in Parcel 9.

2. Parcel 9 presently lies within the bed of the river between the lines of ordinary high and low water marks as determined by the court.

B. **Conclusion of Law**

Plaintiff, as against the defendant, owns Parcel 9.

XII.

Damages

A. **Findings of Fact**

1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding the filing of the original complaint herein until to date, namely, from June 7, 1959, to date.

2. Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total

amount of minerals taken within the low-high water boundaries established by this Court.

5. With respect to materials that were removed, the Court finds as follows:

(a) 574,000 cubic yards of minerals were removed from Parcel 1.

(b) 56,000 cubic yards of minerals were removed from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

(c) No material was removed from Parcel 4.

(d) 9,000 cubic yards of minerals were removed from Parcel 5.

(e) 21,000 cubic yards of minerals were removed from Parcel 6.

(f) No minerals were removed from Parcel 7.

(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

B. **Conclusions of Law**

1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment.

Dated this 19th day of June, 1972.

/s/ RICHARD MENGLER
Circuit Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	)))))))	No. 21512 Supplement to Court's Findings of Fact and Conclusions of Law

WHEREAS, on June 19, 1972, the Court entered its Findings of Fact and Conclusions of Law; and

WHEREAS, the parties filed objection thereto and requested other and different findings; and

WHEREAS, the plaintiff was to submit detailed property descriptions as part of the Court's findings by way of Supplement thereto,

NOW, THEREFORE, the Court does hereby enter its Supplement to its Findings of Fact as follows:

1. Findings of Fact IV A. 2.(a), Page 3, Line 7 is amended to read, "207.7".

2. Findings of Fact VI A. 3., Page 4, Line 27, is amended by deleting, "possibly".

3. Findings of Fact X, Page 8, is amended by adding the following additional finding after Line 10, Page 8:

"4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11."

4. A legal description of each of the parcels involved in this litigation, as amended by the Court's Findings of Fact and Conclusions of Law and the within Supplement thereto, is annexed hereto as Exhibits A through K and made a part hereof by reference.

Dated this 28 day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

COPY OF JUDGMENT OF
BENTON COUNTY CIRCUIT COURT
No. 21512
(Parcel Legal Descriptions omitted)

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512 JUDGMENT

The above entitled matter having come on regularly for trial before the Court without a jury; plaintiff appearing through its attorneys Lee Johnson, Attorney General; by Peter S. Herman, Senior Counsel; and Philip J. Engelgau, Assistant Attorney General; defendant appearing through its president, John H. Gallagher, and through its attorneys, Robert Mix and George Mead; and the Court having considered the evidence of the parties and the arguments of counsel and having heretofore denied defendant's motion to reconsider the Court's previous rulings on the pleadings, and the Court having entered its Findings of Fact and Conclusions of Law and its Supplement thereto;

NOW, THEREFORE, the Court does hereby order and adjudge as follows:

I.

Defendant's motion asking the Court to reconsider its previous rulings on the pleadings is denied.

II.

Parcel 1

Plaintiff is the owner in fee simple of Parcel 1, and is entitled to the immediate possession thereof; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 1 is annexed hereto as Exhibit A and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Seventy-One Thousand Seven Hundred Fifty Dollars ($71,750.00) as damages for the wrongful withholding of possession of Parcel 1 by the defendant from July 1, 1959, to the date of this Judgment.

III.

Parcels 2A, 2B and 2C

Defendant is the owner in fee simple and entitled to the possession of Parcels 2A, 2B and 2C. A legal description of Parcels 2A, 2B and 2C is annexed hereto as Exhibits B, C and D, respectively, and made a part hereof.

IV.

Parcel 3

Plaintiff is the owner in fee simple of Parcel 3 and was entitled to the immediate possession of said parcel prior to July 1, 1963, the beginning date of the ten year lease between the parties covering said parcel. A legal description of said parcel is annexed hereto as Exhibit E and made a part hereof.

It is THEREFORE ORDERED that Plaintiff do have and recover from the defendant the sum of Seven Thousand Dollars ($7,000.00) as damages for the wrongful withholding of possession of said parcel by the defendant on and between July 1, 1959, and July 1, 1963.

V.

Parcel 4

Plaintiff is the owner in fee simple of Parcel 4 and is entitled to the immediate possession of said parcel; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 4 is annexed hereto as Exhibit F and made a part hereof.

VI.

Parcel 5

Plaintiff is the owner in fee simple of Parcel 5 and entitled to the immediate possession of Parcel 5; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 5 is annexed hereto as Exhibit G and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant, the sum of One Thousand One Hundred Twenty-Five Dollars ($1,125.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VII.

Parcel 6

Plaintiff is the owner in fee simple of Parcel 6 and is entitled to the immediate possession of Parcel 6; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 6 is annexed hereto as Exhibit H and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Two Thousand Six Hundred Twenty-Five Dollars ($2,625.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VIII.

Parcel 7

Plaintiff is the owner in fee simple of Parcel 7 and is entitled to the immediate possession of Parcel 7; it is

THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 7 is annexed hereto as Exhibit I and made a part hereof.

IX.

Parcel 8

Defendant is the owner in fee simple and entitled to the possession of Parcel 8. A legal description of Parcel 8 is annexed hereto as Exhibit J and made a part hereof.

X.

Parcel 9

Plaintiff is the owner in fee simple of Parcel 9 and is entitled to the immediate possession of Parcel 9; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. Defendant disclaims any interest in said parcel. A legal description of said parcel is annexed hereto as Exhibit K and made a part hereof.

Based on the above items of damages awarded plaintiff, it is ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the grand total of Eighty-Two Thousand Five Hundred Dollars ($82,500.00) and its costs and disbursements herein incurred which are taxed in the sum of $371.50.

Dated this 28th day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

OPINION OF THE OREGON COURT OF APPEALS

No. 1940—September 9, 1974

STATE EX REL STATE LAND BOARD, *Appellant–Cross-Respondent, v.* CORVALLIS SAND AND GRAVEL COMPANY (No. 21512), *Respondent–Cross-Appellant.*

Appeal from Circuit Court, Benton County.

RICHARD MENGLER, Judge.

Argued and submitted July 15, 1974.

Peter S. Herman, Senior Counsel, Salem, argued the cause for appellant–cross-respondent. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Robert Mix, Corvallis, argued the cause and filed the briefs for respondent–cross-appellant.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED IN PART; REVERSED IN PART.

SCHWAB, C. J.

This is an action at law in ejectment by the state pursuant to ORS 105.005, et seq., to recover possession of 11 described parcels of real property constituting portions of the bed of the Willamette River near Corvallis, and to recover damages for the reasonable value of the use of such parcels.

In 1958 the state filed a suit to quiet title to the land adjoining certain lots, which lots constitute a portion of the property in dispute now. In 1959, at trial, the case was dismissed without prejudice on

motion for a voluntary nonsuit for failure of proof. In 1960 the state filed a suit for an accounting and an injunction covering the area in dispute in the case at bar. This case was voluntarily dismissed in 1961 by the state before it was at issue.

The first complaint in this action was filed by the state on June 7, 1965. In the complaint the portion of the riverbed in dispute was described as one parcel; the portions of the riverbed now constituting Parcels 2A, 2B and 2C were omitted. Instead of answering, the defendant filed a complaint in equity seeking to permanently enjoin the state's ejectment action. The state demurred to the complaint. The trial court overruled the demurrer and a decree was entered in favor of Corvallis Sand and Gravel. On appeal the Supreme Court reversed. *Corvallis Sand & Gravel v. Land Board,* 250 Or 319, 439 P2d 575 (1968).

On December 23, 1969, the plaintiff filed its first amended complaint in ejectment in which it described the riverbed it sought to recover as 11 separate parcels and claimed damages for the use of each parcel. On July 7, 1970, the defendant filed its answer, denying the allegations of the complaint and raising 12 affirmative defenses. After procedural disputes leading to several amended answers, trial was held before the court without a jury, commencing October 11, 1971.

On May 25, 1972, the trial court issued a memorandum opinion awarding various parcels to each party and setting the amount of damages for the previous use by defendant of those parcels awarded to the state. Findings of fact and conclusions of law were entered on June 19, 1972. The court supplemented

these findings on July 28, 1972, and judgment was entered the same day. The state appeals from that portion of the order which awards parcels described for the purposes of this litigation as 2A, 2B and 2C to the defendant, on the ground that it erred in finding that these parcels were formed by avulsion, and from the failure of the trial court to award interest on the money judgment from the date of taking by defendant to the date of the judgment. The defendant cross-appeals from a variety of procedural rulings of the court, and the striking of certain of its affirmative defenses, the award of certain parcels to the state, and the award of damages. For the reasons which follow, we affirm the trial court in all its rulings and its judgment with the exception of one relatively minor item of damages which we reverse.

I. Scope of Review

The scope of appellate review of the facts presented in this case was stated in *Reif v. Botz,* 241 Or 489, 496, 406 P2d 907 (1965):

> "* * * On appeal in an action at law from findings of fact by a trial court sitting without a jury, this court cannot again place the evidence on the scales to see which side preponderates. We must confine ourselves to a search of the record for some evidence to support the findings. If we so find * * * those findings cannot be disturbed."

See also, May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971); *State Highway Com. v. DeLong Corp.,* 9 Or App 550, 495 P2d 1215, Sup Ct *review denied* (1972), *cert denied* 411 US 965 (1973). The various findings of fact as to the formation of the various parcels and the amount of material removed

from each parcel must be reviewed in light of this standard.

Much of the dispute in this case centers around the difference in testimony of the expert witnesses of the parties. The credibility of the various witnesses and the weight to be given to their testimony is a matter for the trial court and will not be passed upon again by this court in a law action. *Armbrust v. Travelers Ins. Co.*, 232 Or 617, 376 P2d 669 (1962).

Finally, we should note that when we state facts in this case, we are using the findings of fact of the trial court in all instances in which there is a conflict in the evidence.

II. Ownership of the Parcels in Dispute

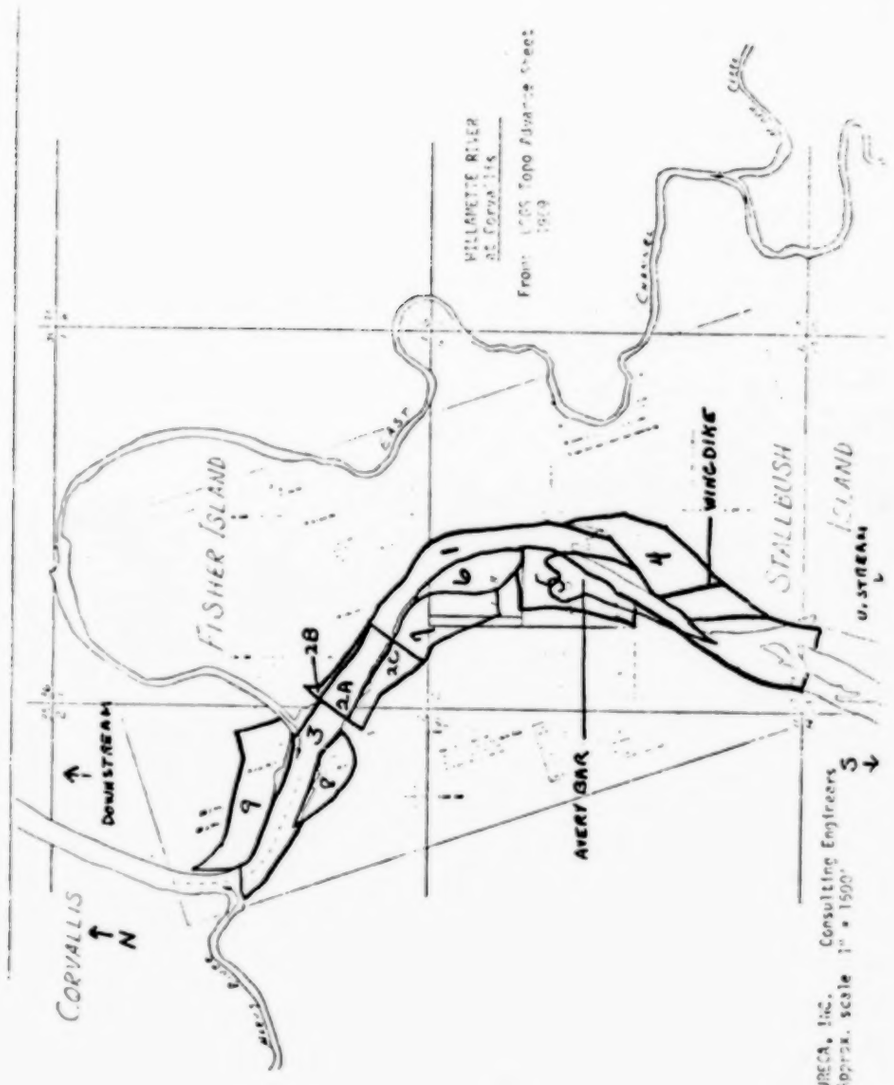
This litigation involves ownership questions of certain parcels of the bed of the Willamette River[1] near Corvallis, Oregon, which parcels lie between ordinary high watermarks in an area bounded by the Mary's River on the north or downstream end, and the City of Corvallis Water Treatment Plant to the south or upstream end. For the purposes of this litigation, the state, in its complaint, divided this section of the river into 11 separate parcels.[2] On appeal, the ownershp of eight of these parcels is in issue.

In order to put the ownership question into perspective, a brief overview of the facts is necessary. Prior to the latter part of 1909, the northerly portion

[1] Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation. For a comprehensive view of the geography of the disputed area, *see* map at 1536.

[2] For a discussion of the propriety of splitting the disputed area into separate parcels and causes of action, *see* pp 1564-1566, infra.

of the Willamette River now shown on the attached map as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of what is shown as Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main



channel at a point to the northwest of Parcels 2A, 2B and 2C. The area shown on the map as Parcels 2A, 2B and 2C, and described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable.

With regard to Parcels 2A, 2B and 2C, the issue involves the consequences of this change of channels, with the state claiming ownership by virtue of its sovereignty over navigable waters and the application of an erosion principle. The defendant contends that the change was actually avulsive and that, in any event, the state's sovereignty does not extend to the bed of the river included within these parcels.

With regard to other of the parcels the issue is who was holder of the original title. Finally, with some parcels, the issue arises because of formations of islands within the bed of the river, accretions thereto, removal of gravel deposits by the railroad, the construction of a wingdike in 1948 by the Army Corps of Engineers, and the general erosive and accretive processes of the river over the course of time.

The trial court awarded Parcels 2A, 2B and 2C to the defendant, and all the others to the state. Both parties raise a variety of factual and legal contentions in opposition to the findings and conclusions of the trial court. We will treat each parcel separately recognizing that, to some degree, the factual discussion as to each parcel will overlap somewhat the general discussion above.

A. Parcels 2A, 2B and 2C (Fischer Cut)

As indicated on the map, Parcel 2A is comprised of bottom land of the Willamette River between ordinary low water. Parcel 2B is riverbed between ordinary high and ordinary low water on the right bank of the river. Parcel 2C is riverbed between the ordinary high water and ordinary low water on the left bank of the river. The trial court made the following findings of fact concerning the area within the Fischer Cut:

> "1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.
>
> "2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.
>
> "3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> "5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.
>
> "6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."

The state argues that ownership of the entire Fischer Cut area passed to the state by virtue of its sovereignty over navigable waters regardless of the manner of the formation of the cut. It also argues that regardless of the state's sovereignty, title to the Fischer Cut river bottom passed to the state because the Fischer Cut did not result from an avulsive change since an existing channel of the river was present prior to its enlargement. Defendant argues that the change was avulsive and that, in any event, *Bonelli Cattle Co. v. Arizona,* 414 US 313, 94 S Ct 517, 38 L Ed 2d 526 (1973), controls the ownership question.

1. The Sovereignty Issue

Under the equal-footing doctrine, as new states were admitted to the Union, they entered with the same rights, sovereignty and jurisdiction as the original states possessed within their respective borders. Accordingly, under the equal-footing doctrine, title to the lands beneath navigable waters passed from the federal government to the state of Oregon upon its admission to the Union. *Bonelli,* 38 L Ed 2d at 534; An Act for the Admission of Oregon into the Union, ch 33, 11 Stat 383. Further, under the Submerged Lands Act, 43 USC § 1301 (a) (1), the federal government quitclaimed all federal title to lands beneath navigable streams, as modified by accretion, erosion or reliction. By virtue of its sovereignty over navigable

waters, the state contends that its title to the bed of the Willamette River follows the course of the river wherever it may move. Otherwise, the state argues, the bed will become a "checkerboard" of public and private ownership, seriously impairing the public use of the waters.

Questions of title to beds of navigable rivers must be evaluated in light of *Bonelli Cattle Co. v. Arizona,* supra. In *Bonelli,* the Supreme Court recognized the principle that it would be left to the states to determine what rights they would accord riparian owners in the beds of navigable streams which under federal law belong to the state. However, the question of how far the state's sovereign right extends under the equal-footing doctrine and under the Submerged Lands Act was found to involve a question of right asserted under federal law and, thus, federal common law would apply.

While *Bonelli* involved title to lands formerly under the main channel that had since become dry, the basic public policy discussion is equally applicable to the case where certain lands which were not under water are presently under water. The court in *Bonelli* first noted that, historically, title to the beds beneath navigable waters is held by the sovereign as a public trust for protection of navigation and related purposes. The court continued:

"'Such waters * * * are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing * * *.' Shively v. Bowlby * * *

[152 US 1, 11, 38 L Ed 331, 14 S Ct 548 (1894)]."

"The State's title is to the 'riverbed as a bed' • • •." *Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d at 536.

The fundamental purpose of the original grant involves navigational and related interests and the state can often protect these interests by holding a navigational servitude rather than by holding title to the bed.[9]

While the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, *see, Bonelli Cattle Co. v. Arizona,* supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose. The only public purpose cited by the state deals with the question of public recreation in terms of wading, fishing, boating or swimming. However, such rights can be controlled under the navigational purpose doctrine, and title to the bed, asserted here only for the extraction of royalty payments, is not necessary. Certainty of title and other arguments raised by the state under its sovereignty argument do not relate to this legitimate state interest in control of navigation and fishing.

The first portion of *Bonelli* thus stands for several basic propositions. First, the extent of title to submerged lands and navigable waterways must be determined by federal common law. Second, the state's

[9] The court directs the reader to Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion,* 14 Ariz L Rev 315 (1972), wherein the author speaks in terms of title being burdened with the state's "navigational easement." *See,* Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526, 536, n 12 (1973).

interest in the bed of navigable waters is basically that of the control of navigation, fishing and other related public goals. So the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to *Bonelli* and other federal cases to determine whether title to the bed passed to the state under the facts presented in the case at bar.

2. Nature of the Change in the River's Course

The court in *Bonelli* first noted that federal law recognizes the doctrine of accretion whereby the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along the shore. The court then discussed a number of interrelated policy reasons for the application of doctrine of accretion, which reasons refer to the risk a riparian owner runs that his land could be eroded by the action of the adjoining waterway. Under the court's analysis loss of land on a navigable waterway by a riparian owner to erosion would result in title to the bed passing to the state. *See, Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d 534, 536-37.

As defined in *Bonelli,* 38 L Ed 2d at 538, and other federal cases,[9] the doctrine of accretion requires the gradual, imperceptible accumulation of land on a navigable river bank. As found by the trial court and admitted by the state, there was no gradual addition or accumulation of land in this case. Rather, the river started to flow through a new channel. Since the accretion doctrine does not apply, the question is what this change to a new channel is denominated under

[9] *See,* Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912).

federal common law and how such a change affects title to the riverbed.

One possibility is that this change was avulsive, as found by the trial court. As defined in *Bonelli,* 38 L Ed 2d at 539, an avulsion occurs where a stream suddenly and perceptibly abandons its old channel. Other federal cases state that such change must be visible in its progress. *See, St. Louis v. Rutz,* 138 US 226, 11 S Ct 337, 34 L Ed 941 (1891). Such an avulsive change does not affect title to the lands submerged by the water since this is not one of the risks run by a nonriparian landowner. *Bonelli Cattle Co. v. Arizona,* supra; *Philadelphia Co. v. Stimson,* 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912); *St. Louis v. Rutz,* supra. While title does not change, the submerged lands do become subject to the public right of navigation, fishing and other related public purposes. *See* discussion, supra, at 10-11. The trial court found that the change in the Fischer Cut area was sudden and perceptible and, thus, constituted an avulsion. We find evidence in the record to support this conclusion.[5]

But even if the doctrine of avulsion does not adequately fit the facts in the case at bar, there is a middle course between the avulsion and accretion doc-

[5] The state relies heavily upon Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964), to support its position that this change was not avulsive in nature. First, it should be noted that federal common law controls ownership questions under *Bonelli* and, thus, state cases are of limited applicability. Second, *Purvine* did not involve the question of the state's ownership of the riverbed but rather involved boundary questions. Finally, the court found that an avulsive change had not been proved on the facts and that, for policy reasons, the court did not wish to apply the avulsion theory because of the effect that theory could have on boundary questions in the future.

trines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in *Commissioners v. United States,* 270 F 110, 113-14 (8th Cir 1920):

> "* * * [The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream * * *."

While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new main channel but rather remained in the old main channel. In fact, at least one court claims that the rule in *Commissioners* was a rule of avulsion. *See, Durfee v. Keiffer,* 168 Neb 272, 95 NW2d 618 (1959). The rule of *Commissioners*

was apparently recognized in *Kansas v. Missouri*, 322 US 213, 64 S Ct 975, 88 L Ed 1234 (1944).

Since the rule of *Commissioners* yields the same outcome as the avulsive theory, the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state. The government will hold the paramount navigational servitude, but will not become the owner of the submerged lands.

3. Conclusions

There are several conclusions we distill from *Bonelli* and other cases dealing with navigable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose. Lands granted to the state of Oregon upon its admission in 1859 which were under water and are still under water belong to the state of Oregon at this time. While the grant of the bed in 1859 is not absolutely necessary for the paramount public purpose of control of navigation, it was, perhaps, the way the Congress felt the question of title to riverbeds should be determined. It can also be determined from *Bonelli* that where a bed of a river shifts by a slow process of erosion or accretion, title of the state to the bed of the river follows the change. However, where there is an avulsive change or a change that, under *Commissioners*, is treated like an avulsive change, the state does not obtain title to land under the water as it presently flows. The state's interest in navigation and other related purposes does not extend to a need for ownership of the riverbed.

Adequate evidence was introduced to support either the theory of avulsion as found by the trial court or a situation similar to that in *Commissioners*. But under either theory, the outcome is the same—the ownership of the land under the river does not change. The ownership of the overflowed lands in Parcels 2A, 2B and 2C remains with the owner of those lands before the changes of 1909, subject only to the paramount navigational servitude held by the state. This portion of the judgment of the trial court is affirmed.

B. Parcel No. 1

Parcel No. 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant, and its downstream limits coinciding with the upstream limits of Parcel 2A. The trial court ruled that Parcel 1 belonged to the state. There are three separate issues involves in the ownership question of Parcel No. 1: (1) the length of the Fischer Cut; (2) the ownership of an area denominated the Avery Bar; and (3) the effect of the U.S. Army Corps of Engineers' wingdike. These will be treated separately.

1. Length of the Fischer Cut

The defendant contends that the change of 1909, which it terms an avulsion, extended a distance of 3200 feet upstream from the downstream ends of Parcels 2A, 2B and 2C, and, therefore, included a portion of Parcel 1. The trial court ruled that the Fischer Cut did not extend upstream above Parcels 2A, 2B and 2C. However, the court did find that a small portion of Parcel 3 was included within the limits of Parcels 2A,

2B and 2C. This makes the cut area approximately 1600 feet in length. There is ample evidence both in the maps and in testimony of the state's expert witness to support this finding. The cut did not extend into Parcel 1.

2. The Avery Bar Issue

The Avery Bar area extends from Parcel 5 through Parcel 1. The defendant contends that when the Avery Bar was removed for gravel purposes by the railroad in the early twentieth century, the river moved back in over the excavated land. It argues that Avery Bar arose as an accretion from Parcels 5 and 6 which the defendant also contends it owns and, as such, when it was covered by water, it still belonged to the defendant. The trial court made the following finding of fact:

"• • • • •

"3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

"4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

"5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

"6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10 [Parcel 5].

"7. Thereafter, a point bar developed on top of the joinder.

"8. Thereafter, the railroad in 1913 removed most of the bar by dredging large quantities of rock and gravel.

"9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10 [ownership of these lots discussed infra at 1551-1553].

"10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

"11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914."

It is established that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is a property of said riparian proprietor. *St. Louis v. Rutz,* supra, 138 US at 245. Further, the owner of an island is entitled to land added thereto by accretion. 65 CJS 261, Navigable Waters § 82 (6).

Once again the facts settle into separate positions taken by the parties' expert witnesses. The state's witness claimed that the Avery Bar started as an island and that the deposits accreted to the island. The defendant's witness, on the other hand, contended that Avery Bar was an accretion to the uplands, namely Parcels 5 and 6, which the defendant claims it owns. There is evidence to support the trial court's finding and it is affirmed.

3. 1948 Corps of Engineers' Wingdike Formation

Much of this argument overlaps the Avery Bar argument, supra. The defendant contends that a wing-

dike constructed by the Corps of Engineers in 1948 further covered part of Parcel 1 made up of the Avery Bar area. It again argues that Avery Bar was an accretion to the uplands which the defendant owned and that the avulsive change caused by the wingdike allowed ownership of the land of Avery Bar to continue in defendant. The trial court's finding of fact in the matter is set out in full, supra. There is evidence to support these findings.

C. Parcel 3

Parcel 3 lies in the bed of the river between ordinary low watermarks and runs from the upstream end of Parcel 2A past the confluence with the East River to a point approximately equal to the confluence with Mary's River. On July 1, 1963, the state leased to the defendant for a term of ten years that portion of Parcel 3 beginning at the confluence with the East River and extending downstream for approximately 4,000 feet. The trial court split Parcel 3, awarding the downstream portion from the confluence with the East River to the state, and the upstream portion from the confluence of the East River to the defendant, finding that it was within the Fischer Cut. The state appeals from that portion of the decree awarding the area upstream of the East River to defendant. There is evidence supporting a finding that the portion upstream from the confluence of the East River was included within the Fischer Cut. Under *Bonelli* and related cases, title to that land remained in the original owner.

D. Parcel 4

On appeal, defendant has abandoned all claim to this parcel so it need not be discussed herein.

E. Parcel 5

Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river. The trial court awarded this parcel to the state below the ordinary high watermark. The defendant argues:

1. That the northerly one-third of Parcel 5 is included in the avulsive change of Fischer Cut;

2. That a portion of Parcel 5 is included in the Avery Bar area; and

3. That the Corps wingdike of 1948 was an artificial change of channel which worked no change of title, and was an artificial avulsion.

The trial court made the following findings of fact:

> "1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.
>
> "2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76."

The question of the length of the Fischer Cut and the formation of the Avery Bar has already been discussed above. There is evidence to support the trial court's ruling that Parcel 5 was not within the avulsive change and that the Avery Bar did not form as an accretion to Parcel 5.

There are still several portions of Parcel 5, however, that do not fall in either the Fischer Cut or Avery Bar category. The question to be resolved as to these areas involves a United States patent to certain lands and Acts of the Oregon legislature in 1874 and 1878.

In 1874, the legislature granted the area on the Willamette River between low and high water to adjacent riparian owners. General Laws of Oregon 1874, p 76.

In 1875, defendant's predecessor in interest, one Norring, filed for a homestead on Government Lots 9, 10 and 12; Parcel 5 is the area between high and low water fronting Lots 9 and 10. On October 18, 1878, the Governor signed a law repealing the statutory grant of land between high and low water on the Willamette River. General Laws of Oregon 1878, § 34, p 54. The patent to Government Lots 9 and 10 was not issued to Norring by the United States government until April of 1882. The question thus presented is whether Norring was an "owner" within the contemplation of the Oregon statute when he settled on the property in 1875 and, if not, did the patent obtained in 1882 relate back to his original entry in 1875 rendering him an owner within the contemplation of the statute.

In support of his contention that Norring was an "owner," defendant relies upon *Faull v. Cooke,* 19 Or 455, 26 P 662, 20 Am St R 836 (1890), in which the court determined what rights a homesteader acquired in land by virtue of his homestead settlement and subsequent compliance with the Act of Congress granting homesteads to actual settlers upon the public lands of the United States and the issuance to him of a patent therefor by the United States. In *Faull* the court found that a homestead patent related back to the date of settlement. However, the question here concerns not homestead rights but the granting of the state lands between high and low water to the owner of riparian lands bordering thereon. *State v. McVey,* 168 Or 337,

121 P2d 461, 123 P2d 181 (1942), speaks more nearly to the point. In *McVey* the court considered the question of ownership of a gravel bar between high and low water. The court first noted that General Laws of Oregon 1874, p 76, did not vest title in the bed between high and low water in the federal government. The court then construed the statute and tried to determine the intent of the legislature and the historical background of the legislation. The court first noted in *McVey,* 168 Or at 353-54:

> "* * * It was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua rivers had treated the river beds between high and low water marks as private property and had sometimes improved such parts of the river beds by the erection of expensive structures, that the legislature amended the 1872 enactment so as to protect them and their investments by making a grant of the beds of those rivers above low water mark to the riparian owners * * *.
>
> "The legislature was concerned with private ownership of property abutting upon tide lands and property adjacent to the beds of certain designated navigable rivers. It was not concerned with the United States as owner of any such lands. * * * It may be noted * * * that the act did not grant to a settler the right to purchase the tide land until *after* he had received a patent from the federal government." (Emphasis supplied.)

Norring did not become an "owner" until after he had received the patent from the federal government. Since he did not receive the patent until after the date of the repeal of the Act authorizing him to obtain ownership of the land between high and low water-marks, he was not an "owner" within the terms of the statute.

The defendant's second argument is that the patent received by Norring in 1882 related back to his entry on March 15, 1875, when the statute granting ownership to the low water level was in effect. Defendant again cites numerous cases involving homestead law in which the patent does relate back to the date of entry insofar as it cuts off a title of one who enters after the original entryman. As made clear in *State v. McVey,* supra, the disposition of these lands is controlled by state law, and the doctrine of relation back will not apply.

Defendant makes reference to ORS 105.070 in support of his relation back claim. That statute declares that in an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Donation Law, such party from the date of his settlement on the property is deemed to have a legal estate and fee in the property. This statute originated in 1862 in General Laws of Oregon, § 329, p 230 (Deady 1845-1864), well before the statutes in question here and the decision in *State v. McVey,* supra. Also, this refers to lands owned by the United States government and passed under the homestead acts. It does not control the later state legislative enactments dealing with the state's land between high and low water.

F. Parcel 6

Parcel 6 also lies in the left bank of the river and consists of land between ordinary high and ordinary low water. Defendant contends that Parcel 6 is in actuality Government Lot 11 of Section 12 which was patented by the defendant's predecessor in title

before the repeal of the 1874 statute. The state admits that the patent on Government Lot 11 was completed prior to the repeal of the laws of 1874, but contends that Government Lot 11 has eroded away completely and that Parcel 6 arose from an island in the river that joined by accretion to the uplands.

The trial court made the following findings of fact:

"1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

"2. Parcel 6 is not within the avulsive channel of Fischer Cut.

"3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

"'4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11.'"

Both parties agree that defendant's predecessor in title acquired rights in Government Lot 11 and the submersible lands fronting it, so paragraph 3 of the findings of fact is incorrect. However, there was adequate evidence introduced to support the finding that Government Lot 11 eroded away and that Parcel 6 formed in the bed of the river and accreted to the uplands. So long as this parcel remains submersible, title will remain in the state. *See, Bonelli Cattle Co. v. Arizona,* supra.[9]

---

[9] The court in *Bonelli* adopted the doctrine of re-emergence:

"Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges

(Continued on page 57)

G. Parcel 7

Parcel 7 is in an area between ordinary high and ordinary low water on the left side of the river. It consists of part of Government Lot 13, Section 12, and the Alexander Donation Land Claim. The defendant contends on appeal only that Parcel 7 was within the alleged avulsive change of 1909 occurring in the Fischer Cut area and, therefore, should belong to the defendant. The trial court found that it was not within the cut. There is evidence to support this finding.

III. Procedural Questions Relating to Damages

The defendant raises several assignments of error relating to the damages awarded by the court for those parcels given to the state. The defendant first contends that the state's failure to use an *ad damnum* clause in its pleading required the trial court to exclude all evidence on damages. This contention was decided adversely to defendant's position by *Hollopeter v. Palm*, 134 Or 546, 550, 291 P 380, 294 P 1056 (1930),

(Continued from page 56)

as a result of perceptible change in the river course, title to the surfaced land revests in its former owner * * *. The re-emergence doctrine has been accepted by a number of States * * *. Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land *identifiable as part of his original parcel*. In that sense, we have embraced the re-emergence concept." (Emphasis supplied.) 38 L Ed 2d at 541, n 28.

In the case at bar, no evidence was introduced to show that any portion of Government Lot 11 was above ordinary high water. To the extent that a portion of Lot 11 is now emerged or re-emerges in the future, title to that portion could return to the defendant. For possible limitations on this return of title, *see*, Annotation, 41 ALR 395 (1926). On the facts as presented, we need not settle that question now.

appeal dismissed 284 US 572 (1931), wherein the court concluded that the entire omission of the *ad damnum* clause was immaterial where, as here, after a cause of action is set out there is a prayer for a specified amount.

Defendant also argues that the court erred in denying its motion to exclude evidence from the case on damages which occurred after the filing of the complaint in the original case in June of 1965. Damages in ejectment proceedings are provided for by ORS 105.030, which statute specifically permits the recovery of damages from the date of the commencement of the action to the giving of a verdict.

The defendant next contends that the court erred in denying its motion to exclude evidence relating to quantities of gravel dredged from the river. Defendant claims that since the state has pleaded as the measure of damages the reasonable value of the use of the premises for each year or, as admitted by defendant, rental value, it cannot introduce proof as to amount of gravel removed since that does not relate to rent. However, it is noted in Newell on Ejectment, ch XIX, § 3, 606-07 (1892):

> "*Whatever* would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment. But these profits frequently include matters which would hardly be termed rent as between landlord and tenant * * *." (Emphasis supplied.)

Accord, Crane v. Oregon R. & N. Co., 66 Or 317, 328, 133 P 810 (1913). Mesne profits are defined as the rents and profits or the value of the use and occupation of the real property recovered in an action of eject-

ment for the period during which the property has been wrongfully withheld. Newell, supra, § 2.

There are numerous cases which find that royalty payments pursuant to a lease would constitute mesne profits or rent in an ejectment action. *See, United States Steel Corporation v. United States,* 270 F Supp 253, 259 (SD NY 1967), *aff'd* 445 F2d 520 (2d Cir 1971), *cert denied* 405 US 917 (1972); *Moragne v. Doe, ex dem. Moragne et al.,* 143 Ala 459, 39 So 161, 111 Am St R 52 (1904); *Barnard v. Jamison,* 78 Cal App2d 136, 177 P2d 341 (1947).

Finally, under ORS 274.530, when the state leases its submersible and submerged lands in navigable streams, the lease is not payable in a lump sum but only on the basis of a price per cubic yard or ton for the material removed. Under the statute, "rent" would be the same as "royalties" and these would be determined on the basis of the total amount of material removed from the river.

In sum, where, as conceded by defendant, the state pleaded lost rent as its damages in an ejectment action, it would be able to show the value of that lost rent through the use of royalties based upon the total amount of material removed from the river.

IV. Amount of Damages

Defendant contends that the court erred in allowing any damages to the state because such damages were speculative and also that the court erred in awarding any damages to the state for the removal of sand and gravel from Parcel 3 as there was no substantial evidence to support the same. The trial court

made the following determinations in regard to damages:

"1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding [sic] the filing of the original complaint herein until date, namely, from June 7, 1959, to date.

"2. Defendant is not entitled to an offset for 'avoidable consequences' or for failure to mitigate damages.

"3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of materials removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

"4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

"5. With respect to materials that were removed, the Court finds as follows:

"(a) 574,000 cubic yards of minerals were removed from Parcel 1.

"(b) 56,000 cubic yards of minerals were reremoved from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

"(c) No material was removed from Parcel 4.

"(d) 9,000 cubic yards of minerals were removed from Parcel 5.

"(e) 21,000 cubic yards of minerals were removed from Parcel 6.

"(f) No minerals were removed from Parcel 7.

"(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

"B. Conclusions of Law

"1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

"2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment."

The state's witness testified that the royalties for the material removed ranged from 10 cents per cubic yard to 15 cents per cubic yard in the period of time during which the material was removed. There is thus evidence to support the cubic yard royalty figure established by the court. To establish the amount of damages, the state first introduced evidence dealing with the amount of gravel removed by three independent contractors. Records of the amounts dredged by the Joe Bernert Towing Company were furnished by the defendant to the state's fiscal auditor at the Division of State Lands. These records indicated the number of cubic yards removed during each year of the period 1963-1968 (with the exception of 1966 wherein no material was removed by this independent contractor). Evidence was also introduced dealing with the amount removed by the Willamette Tug and Barge Company based on the number of buckets removed during a given period in 1960 and the average number of cubic yards removed per bucket. Finally, Mr. Alfred Millar testified that he had dredged approximately 40,000 cubic yards from the river. Proof as to location of material taken by the independent dredge operators was based on aerial photographs marked by the

witnesses as to locations of removal, and estimates of quantities removed between low watermarks in each parcel and between high water and low watermarks.

Proof was also introduced of the amounts of gravel taken by defendant with its own equipment and personnel. The defendant furnished the state its ledger records which had been prepared on a monthly basis for the period July 1, 1959, to December 31, 1970. Raw production totals of materials were shown from the year 1959 through 1970. The state then estimated that at least 50 percent of the amount of the raw materials production came from the riverbed. Adequate evidence was introduced to support this 50 percent figure.

Combining the figures introduced, the following totals were obtained: Parcel 1: 757,588.3 cubic yards (the trial court found 574,000 cubic yards had been removed); Parcels 2A, 2B and 2C: 104,964.9 cubic yards (the trial court awarded these parcels to the defendant); Parcel 3: 120,468.6 cubic yards (the trial court found that 56,000 cubic yards had been taken out prior to July of 1963); Parcel 5: 11,506.4 cubic yards (the trial court found 9,000 cubic yards had been removed); Parcel 6: 26,427.1 cubic yards (the trial court found that 21,000 cubic yards had been removed).

There is evidence to support the trial court's finding in regard to Parcels 1, 5 and 6.

There is a substantial question raised with regard to Parcel 3. While the evidence introduced by the state showed that over 120,000 cubic yards had been removed, the state makes no claim for these amounts since they relate to material taken subsequent to July 1, 1963,

and thus were covered by the lease between the parties. The state, however, argues that the trial court's award of 56,000 cubic yards should be affirmed on the basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest as part of its damages.[1]

The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land,

[1] Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"* * * * *

"(b) Judgments and decree for the payment of money from the date of the entry thereof unless some other date is specified therein * * *."

such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in *Meyer v. Harvey Aluminum*, 263 Or 487, 501 P2d 795 (1972), that interest is not allowable on unliquidated damages. Damages are unliquidated

> "* * * where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In *Rose City Transit v. City of Portland*, 99 Adv Sh 1187, — Or App ——, — P2d — (1974), we allowed interest from the date of the taking of the property in question. However, in *Rose City*, unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. *See, Medak v. Hekimian*, 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to

take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and other physical evidence from which he obtained such facts forming the basis of his opinion. Argument on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting data and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party * * * and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken * * * or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *." ORS 45.181.

It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. *Richardson-Merrell, Inc. v. Main,* 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and, thus, by implication the Oregon

rules, the granting or denial of a protective order is within the discretion of the trial court. *See,* 8 Wright and Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F2d 1204 (8th Cir 1973). In the absence of a transcript of the oral argument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. *Wood et ux v. Baker et ux,* 217 Or 279, 284, 341 P2d 134 (1959). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause of action is stated in 1 Bancroft, supra at 586-87:

> "* * * If the rule were otherwise, one could split his demand into innumerable parts, thereby

> multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in *Coos Bay Oyster Coop. v. Highway Com.,* 219 Or 588, 348 P2d 39 (1959), cited by defendant, the court notes that:

> "* * * Allowance of separate actions for fractional claims would inevitably result in the pyramiding, duplicating and overlapping of damage items to the detriment of the condemnor * * *." 219 Or at 594.

Defendant contends that the state's splitting of its case into 11 separate claims made the case unduly complicated, and was done solely for the convenience of the state's expert witness. Applying the policy reasons for avoiding the splitting of a cause of action to the facts of this case, it becomes clear that none of the hazards sought to be protected against were present here. First, all of these causes of action were presented in a single complaint, so there was no danger of the defendant's being harassed by a multiplicity of suits. At the conclusion of the lawsuit, the limits of the property in question, its ownership, and damages, would be determined. As the court noted in *Wood et ux v. Baker et ux,* supra at 285, where there is no question of a multiplicity of suits there is no violation of the rule against splitting a cause of action. Second, splitting of the one parcel into 11 separate parcels reflects more nearly the various geographical differences and historical origins of the parcels involved. Rather than harassing the defendant, such splitting would make it

easier for the factual differences between the parties to be settled.

While *Coos Bay Oyster Coop. v. Highway Com.,* supra, cited by defendant, does support the proposition that interests in land cannot be split into fractional claims, that case involved the attempt to split one interest in real property into several subinterests; this was not the result here. Also, *Coos Bay* must be evaluated in light of the policy determinants behind the prohibition of a splitting of the cause of action. Viewed in this light, we do not find the splitting of the land in question into 11 separate parcels, each the subject of a cause of action, to be improper.

VIII. Prescriptive Rights

The defendant alleges that the company had, continuously since 1920, conducted sand and gravel removal operations from the disputed portions of the Willamette River, which removal had been open, continuous, notorious, hostile, exclusive and adverse to the state, and had been known to the state since 1933. The defendant contends that this removal results in the defendant's acquiring an irrevocable property right to remove sand and gravel from the disputed property. The defendant contends that this property right is one of prescription.

There is some authority that a state may lose rights to property through prescription. As noted in 1 Farnham, Waters and Water Rights 225, § 45b:

> "Where the land under tide water may be granted by the state, no reason exists why a private individual cannot establish title under the theory of lost grant. * * * [R]ecords may become lost,

> and it is unreasonable to require the original grant to be produced in all cases. Therefore the presumption of grant may be raised by long possession accompanied by acts of ownership * * *."

However, it is important to note that this prescriptive right is limited:

> "* * * If the law prohibits the grant of the tide land, no title can be acquired by adverse possession, since no grant can be presumed * * *." 1 Farnham, supra at 226.

Between 1878 and 1963, there was no statutory provision by which the state could grant title to any nontidal portion of the Willamette River. *See, State v. McVey,* supra; *Corvallis Sand & Gravel v. Land Board,* supra. The authority of the state to grant title to submerged and submersible lands in the Willamette River in the Corvallis area arose after 1963. Since the state has been actively contesting defendant's possession of these parcels since 1958, it is impossible for defendant to contend that there has been a "lost grant" prior to 1963. No prescriptive rights arose against the state.

IX.

Defendant raises several assignments of error which need only brief mention. First, it contends that ejectment will not lie to recover the possession of land under water. This question has, by implication, been decided adversely to defendant's claim in *Corvallis Sand & Gravel v. Land Board,* supra. *See also, Lowndes v. Huntington,* 153 US 1, 14 S Ct 758, 38 L Ed 615 (1894); *Bates v. Illinois Central Railroad Company,* 66 US (1 Black) 204, 17 L Ed 158 (1861).

Defendant's argument that estoppel and acquiescence in the trespass should apply against the state in this case was also decided adversely to defendant's position in *Corvallis Sand & Gravel Co. v. Land Board,* supra, 250 Or at 328-29. The same policy considerations that militated against the allowance of the defense of laches in that case apply alike to the defense of estoppel and acquiescence.

Defendant's argument that the statute of limitations applies is without support. ORS 12.250.[9]

Finally, defendant raises certain constitutional challenges to both the ejectment statutes, ORS 105.005, et seq, and the ejectment proceeding as a whole. Both of these points could have been raised in the earlier challenge to the proceeding in *Corvallis Sand & Gravel Co. v. Land Board,* supra, but were not. Even assuming that these arguments are meritorious, defendant is foreclosed from raising them now.

In sum, we affirm the judgment of the trial court in all respects with the exception of the award of damages for Parcel 3, which award we reverse.

Affirmed in part; reversed in part.

---

[9] "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit." ORS 12.250.

OREGON SUPREME COURT CLERK'S LETTER

FEBRUARY 28, 1975

RE ACCEPTANCE OF REVIEW

LOREN D. HICKS
State Court Administrator

January 28, 1975

Mr. Peter S. Herman
Senior Counsel
State Office Building
Salem, Oregon 97310

Mr. Robert Mix
Attorney at Law
745 N. W. VanBuren
Corvallis, Oregon 97330

Re: State ex rel State Land Board v.
Corvallis Sand & Gravel Company

Gentlemen:

With Justice Thomas Tongue not participating, the Supreme Court today allowed defendant's petition for review and denied plaintiff's petition for review in the above case.

The matter will be set for argument the first week of March and you will receive later notification of the exact day and time.

Very truly yours,

ADELL JOHNSON
Adell Johnson
Assistant Administrator

AJ/t

IN THE SUPREME COURT OF THE STATE OF OREGON

No. 1940—June 12, 1975

State of Oregon, Acting by and through
the State Land Board,

Respondent-Cross-Petitioner,

v.

Corvallis Sand and Gravel Company,
an Oregon corporation,

Petitioner.

On Review from the Court of Appeals.

Argued and submitted April 3, 1975.

Robert Mix, Corvallis, argued the cause and filed the briefs for petitioner.

Peter S. Herman, Senior Counsel, Salem, argued the cause for respondent and cross-petitioner. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before O'Connell, Chief Justice, and McAllister, Denecke, Holman, Howell and Bryson, Justices.

HOWELL, J.

Affirmed as modified.

HOWELL, J.

This is an action in ejectment brought by the state pursuant to ORS 105.005 et seq. The state sought to obtain possession of the Willamette riverbed in the Corvallis area and damages for the reasonable value of the defendant's use of portions of that riverbed. The trial

court awarded to the defendant certain portions of the riverbed within an area known as Fischer Cut and awarded other disputed portions to the state. Both parties appealed the judgment of the trial court to the Court of Appeals. The Court of Appeals affirmed the trial court's division of the parcels of land involved but reversed the trial court's award of damages for defendant's use of an area known as Parcel 3.

The history of this litigation and the numerous legal and factual issues are set forth in the opinion of the Court of Appeals, Land Bd. v. Corvallis Sand & Gravel, 99 Adv Sh 1532, — Or App ——, 526 P2d 469 (1974). We agree with the Court of Appeals that there was substantial evidence in the record to support either the theory that Fischer Cut of the Willamette was formed by an "avulsive" process or by the "exception to the accretion rule" process as described by the federal court in Commissioners v. United States, 270 F 110, 113-14 (8th Cir 1920). We accepted defendant's petition for review solely on the question concerning the length of the Fischer Cut area through which the Willamette River has coursed since a major flood in 1909.

The trial court made the following findings regarding Fischer Cut:

"1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

"2. By 1890 a clearly discernible overflow chan-

nel over the neck of the peninsula had developed known as Fischer Cut.

"* * * * *.

"4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

"* * * * *.

"6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible, but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"* * * * *."

The trial court awarded Parcels 2A, 2B and 2C to the defendant. Those parcels lie between the lines of ordinary high water and encompass a riverbed distance of 1250 feet. In addition to this award, the trial court added to the length of riverbed awarded to the defendant the area downstream from the end of Parcels 1A, 2B and 2C to the confluence of the East River Channel and the Willamette River. This area came from part of Parcel 3 and was made, as the state conceded at oral argument, on the basis of the statutory grants available to riparian owners between 1874 and 1878.

On appeal to this court, the state maintains that the trial court's findings regarding the length of Fischer Cut are correct. However, Corvallis Sand & Gravel contends that Fischer Cut is 3200 feet in length and that the trial court's finding of the length of the cut is not supported by the evidence.

The evidence concerning the length of Fischer Cut consists of various documents and testimony. The asserted 1250-foot length of Fischer Cut coincides with the linear riverbed distance of Parcels 2A, 2B and 2C which the state first claimed in its 1969 complaint. The state argues that portions of the Fischer Cut area eroded away between 1890 and the 1909 flood. At trial, the state's expert witness, Ronald McReary, utilized a 1936 aerial photograph to point out an alleged cutbank on the upstream side of Parcels 2A, and 2B, thus suggesting that the Cut was only 1250 feet long. The state also relied upon the testimony of one of its witnesses, Fred Fischer, who, as a boy, roamed through the area of Fischer Cut and who testified that the Willamette River moved east and took several acres of land with it. However, the state, in attempting to prove its erosion theory and the 1250-foot figure, relies on documentary evidence showing the area *after* the 1909 flood. Further, Mr. Fischer's testimony, taken as a whole, fails to explain whether the erosion he referred to occurred before or after 1909.

The evidence that Fischer Cut at the time of the

1909 flood was 3200 feet in length is substantial and highly persuasive. The trial court found that in 1906 the Fischer Cut was in practically the same location as it was in 1890 and that until 1909 the Willamette River continued to flow around Fischer Island. In 1890 the U.S. Army Corps of Engineers carefully mapped this stretch of the Willamette River, including the area of Fischer Cut. The 1890 Clapp map shows the existence of an overflow channel in the Fischer Island area. Both parties stated that this map was carefully drawn and prepared. The scale shows that the overflow channel from "upstream" to "downstream" points is approximately 3200 feet in length.

Later, in 1906, three years before the flood, Major G. W. Roessler of the Corps of Engineers sent Assistant Engineer David B. Ogden to examine the overflow channel in the area of what today is known as Fischer Island. Ogden's report to Roessler states, in pertinent part:

> "The channel in question is across the neck of a peninsula and is some 3200 feet long, while the distance around by the main river is two and one-quarter miles.
>
> "This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to its food (sic) is noted as about 8 feet.

The approximate present location is shown in dotted lines on the sketch herewith."[1]

In addition, the state's witness stated on cross-examination:

> "* * * I would say the best evidence of it [the length of the eroded chute] is the distance shown on the map of 1890 which appears to be a very carefully prepared and well-engineered drawing and I would say that that is the length of the gully that eventually eroded into what is now the bed of the river."

We find that the best evidence of the length of Fischer Cut at the time of the 1909 flood is the 1890 map, which both parties agreed was carefully prepared and which shows Fischer Cut to be approximately 3200 feet in length.

It is difficult, based on the present record, to correlate the length of Fischer Cut in 1909 to the topography as is existed at the time of trial. We do find, however, that the length of Fischer Cut as it existed in 1909 at the time of the flood is best represented by the channel from point A to point B as shown on the 1890 map. We remand this action to the Court of Appeals with directions to remand to the trial court to correlate points

[1] The distance on the sketch accompanying the engineer's report scales at slightly less than the 3200 feet stated in the body of the letter. However, the 1906 sketch did not purport to represent the exact length of the cutoff or overflow channel, only its approximate location.

A and B with the present topography of the area. Additional testimony may be taken if necessary. Also, on the remand, the trial court should modify or adjust any damages in accordance with our decision herein expanding the length of Fischer Cut. In all other respects the decision of the Court of Appeals is affirmed.

Affirmed as modified.

IN THE SUPREME COURT OF THE STATE OF OREGON

No. 1940—July 17, 1975

In Banc*

State of Oregon, Acting by and through
the State Land Board,

Respondent-Cross-Petitioner,

v.

Corvallis Sand and Gravel Company,
an Oregon corporation,

Petitioner.

On review from the Court of Appeals.

Upon respondent-cross-petitioner's petition for rehearing filed June 20, 1975, and petitioner's petition for rehearing filed July 3, 1975.

Lee Johnson, Attorney General, W. Michael Gillette, Solicitor General, and Peter S. Herman, Senior Counsel, Salem, for the respondent-cross-petitioner.

Robert Mix, Corvallis, for the petitioner.

HOWELL, J.

Petitions for rehearing denied; original opinion clarified.

HOWELL, J.

In our original opinion we emphasized that we accepted the defendant's petition for review of the decision of the Court of Appeals on the sole issue of the length of Fischer Cut as it existed at the time of the

*Tongue, J., did not participate in this decision.

1909 flood. We held that the length of Fischer Cut as it existed in 1909 was best represented by the channel from Point A to Point B as shown on the 1890 map and remanded the cause with directions to the trial court to correllate Points A and B with the present topography of the area and to modify or adjust any damages accordingly.

Both parties have filed petitions for rehearing. The defendant's petition raises no new matter and is denied. The petition of the plaintiff, the State of Oregon, expresses concern that our opinion could be interpreted to include as an award to defendant a portion of the riverbed in Parcel 3 which the plaintiff leased to the defendant in 1963 and which defendant has admitted in its pleadings that it had no ownership therein.[1]

To prevent any misunderstanding, our former opinion is clarified to the following extent: if correlating Points A and B of Fischer Cut results in any portion of that length falling within a portion of the riverbed to which the defendant has disclaimed ownership, then the ownership of plaintiff remains unaffected.

Both petitions for rehearing are denied.

[1] The plaintiff leased to defendant "That portion of the bed of the Willamette River owned and controlled by the State of Oregon *beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream* 4000 feet all in section 2 Township 12 South Range 5 West Willamette Meridian." (Emphasis supplied)

The defendant's amended answer alleged: "Defendant is the owner in fee simple of the property described in defendant's amended complaint, *except that defendant does not own that portion leased by plaintiff to defendant* * * *." (Emphasis supplied)

STATE OF OREGON
SUPREME COURT

Mandate

STATE OF OREGON, Acting by and through the STATE LAND BOARD, Respondent, Cross-Petitioner v. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Petitioner	))))))))	Appeal from BENTON County On Review from Court of Appeals

This cause on April 3, 1975, having been duly argued and submitted upon the sole issue arising on defendant's petition for review from the Court of Appeals, and the court having fully considered said issue as well as suggestions of counsel in their argument and brief finds that the decision of the Court of Appeals should be affirmed as modified.

IT THEREFORE IS ORDERED and ADJUDGED that the decision of the Court of Appeals is affirmed as modified and the cause is remanded to the Court of Appeals with directions to remand to the trial court for further proceedings in conformity with the opinions of the court herein.

ENTERED at Salem, Oregon, this 12th day of June, 1975.

STATE OF OREGON
COURT OF APPEALS

STATE OF OREGON, Acting by and through the STATE LAND BOARD, Appellant–Cross-Respondent, v. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Respondent–Cross-Appellant.	))))))))	JUDGMENT and MANDATE Appeal from BENTON County No. 21512

This cause having come on to be heard on appeal and the court having found that the decision of the court below should be affirmed in part and reversed in part, and subsequently the cause having gone to the Supreme Court on Petition for Review and said court on *June 12, 1975 having affirmed as modified the decision of this court and entered its mandate as attached:*

NOW THEREFORE, IT IS ORDERED and ADJUDGED that the decision entered below is affirmed in part, reversed in part and modified in part and the cause is remanded to the trial court for further proceedings in conformity with the opinions of the Supreme Court and the Court of Appeals.

IT IS FURTHER ORDERED that respondent–cross-appellant recover from appellant–cross-respondent damages, costs and disbursements in this court in the amount of $40.

ISSUED at Salem, Oregon: AUG. 12, 1975.

SUPPLEMENTAL
JOINT APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

Petitions for Certiorari filed
October 14, 1975 (No. 75-567) and
October 15, 1975 (No. 75-577)
Certiorari Granted January 12, 1976

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, by and through the State Land Board, Plaintiff,	)	
v.	)	No. 21512
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	)	

PARTIAL TRANSCRIPT — TESTIMONY OF FRED McHENRY

[936]

FRED McHENRY, being called as a witness, was first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Mix:

Q For the record, will you state your name, please?

A Fred McHenry.

Q And Judge McHenry, may we ask what year you were born, please?

A 1889.

Q And how long have you lived in Corvallis?

A Since May—no, since April 1898.

Q I see. That's been continuous, has it?

A Yes.

Q I believe you attended Oregon State University, did you not?

A I did.

Q And during what years was that, please?

A From fall of 1905 until the spring of 1909.

Q I see. And then what did you do after that in Corvallis, please?

A Well, until 1912 I was engaged with my father in a building

[937]

—contracting building; 1912 I began as a deputy clerk in the county clerk's office here in this courthouse.

Q And how long did you continue as county clerk?

A Well, I was the deputy clerk until 1920 except for two years during the World War 1, and then I was appointed county clerk and I think it was January of 1920 and I served until January 1923, at that time I accepted the office—no, I was elected and took the office of district attorney which I held until April of 1949 and from 1949 until 1964 I was circuit judge here in this district and since then I have been retired.

Q Still practice a little law though?

A Well, yes.

Q All right. Judge McHenry, I direct you specifically to the area of Corvallis that we will call the Fischer Cut area and Fischer Island and so on, I am sure you are familiar with that?

A Yes, I am.

Q That section of the county?

A In a general way.

Q Yes. Did you have any occasion to visit this area, we'll say, oh, during the periods you were attending Oregon State University?

A Yes, I am sure I did.

Q Do you recall a particular occasion when you went there

[938]

to view the river?

A Well, I don't recall the occasion that prompted me to go there, but I recall very definitely of being there on some occasions and seeing the river as it was then.

Q All right. Would you tell us, please, where you went and in terms of present day monuments, so to speak, where you stood and what you saw, please?

A Well, I don't know how many people here that know where the old Fischer Flour Mills stood or not—

Q That would be on the millrace where Evans Products is presently located?

A Right at the end of the millrace where it flows into the Willamette and the road went by this flouring mills toward the river and turned to the right and followed along the bank of the river up to

and into the Masonic Cemetery, Crystal Lake Cemetery.

Q Is this what we refer to as the Crystal Lake Road?

A Yes.

Q So to speak—all right.

A And there was a walk, a board walk, the fact is, there was board walks from the bridge crossing Marys River clear around to Fischer Mill and from Fischer's mill on around to, well, I wouldn't say it went clear to the cemetery, but practically to the cemetery.

Q Do you recall the occasion when you—particular occasion

[939]

when you went out to view the river?

A Yes, I remember doing it.

Q All right. Do you recall what prompted you to go out, I mean, why did you go out to look at the river?

A Well, there was quite a little comment or talk about the river having broken through and at that time there wasn't much excitement around except something of that kind and just out of curiosity I went out there. I don't recall exactly when, but I did go out there and I observed it. In fact, I was acquainted with the old river where it comes around

what we now call East River and I observed when I was there that the main body of the river apparently was coming right across and into this East River.

Q Would this be through what we call the Fischer Cut area?

A I don't know what—I'm not familiar with Fischer Cut.

Q All right. Then but do I understand that this new channel ended at the point where East River comes into the present channel?

A That's right, that's right.

Q Did you actually see East River at that time?

A Oh, yes.

Q I see. And I take it you were standing at a point up on the bank where you could see this general area?

A Yes, I couldn't tell you exactly where I was standing, but I did see it from the bank, the breakthrough stream and

[940]

the old river where they joined.

Q Now, was this a matter of common discussion of the community, this breakthrough?

A Well, I thought it was. It seemed to me it was. I'm surprised there aren't more people around here know about it now.

Q I see. Well, sir, can you give us an approximate date when you visited the scene of the time of the year and the year, if possible?

A Well, I couldn't give you the exact date, of course, or the exact year. I feel quite positive it was either 1909 or 1910 and it was during or shortly after the breakthrough which was during the high water of the winter season. Now, I wouldn't know whether it was December or January or March or when.

MR. MIX: All right. We have nothing further.

CROSS-EXAMINATION

By Mr. Herman:

Q Judge McHenry, were you familiar with the area over which the river ultimately passed through in 1909 or 1910 as you testified prior to this change that you testified to?

A You mean the area over which the breakthrough came?

Q Yes.

A No, I wasn't. I didn't—I knew it was there, but I

[941]

wasn't familiar with it, never been on the ground or didn't know the elevation or anything about it.

MR. HERMAN: No further questions.

MR. MIX: May I ask one more question, Your Honor?

THE COURT: You may.

REDIRECT EXAMINATION

By Mr. Mix:

Q Judge McHenry, I neglected to ask you, do you know where the breakthrough occurred upstream?

A No, I do not.

MR. MIX: We have no further questions.

THE COURT: All right. You are excused, Judge. All right. You can remain and see how things are now.

WITNESS: Maybe I'd better do that.

Supreme Court, U.S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF FOR RESPONDENT CORVALLIS SAND AND GRAVEL COMPANY IN OPPOSITION

ROBERT MIX
745 NW VanBuren
Corvallis, Oregon 97330
Counsel for Respondent

RIDGWAY K. FOLEY
SOUTHER, SPAULDING, KINSEY, WILLIAMSON & SCHWABE
1200 Standard Plaza
Portland, Oregon 97204
Of Counsel

SUBJECT INDEX

	Page
Brief in Opposition.	1
Questions Presented for Review	2
Jurisdiction	2
Constitutional Provisions Involved . .	2
Statement of the Case	
1. Facts Concerning Lack of Jurisdiction Occasioned by Untimely Filing	3
2. Facts Concerning the Avulsive Alteration of the Channel . . .	4
Reasons for Denying the Writ	
1. The Petition for Writ of Certiori of the State of Oregon was not timely filed and should be dismissed	5
2. Because the change of channel of the Willamette River was avulsive as a matter of federal law and because the case of Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517, did not involve the issue of natural avulsive changes, the decision of the Oregon Supreme Court is not contrary to Bonelli	7
Conclusion	14
APPENDIX A	19

INDEX OF AUTHORITIES

Page

Cases Cited

Anderson-Tully Co. v. Franklin, D.C. (N.D.-Miss.) (1960), 307 F.Supp 539 . . . . . 9, 11, 14

Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L.Ed.2d 526, 94 S. Ct. 517 . . . . . 7, 13, 14, 16

Class v. Norton, 505 F.2d 123 (2d. Cir. 1974). 6

Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920) 9, 10

Cornish v. Richland Parish, 479 F.2d 37 (5th Cir. 1973). 6

Durfee v. Keiffer (Neb.), 95 NW 2d 618 (1959). 9, 11

Federal Trade Commission v. Minneapolis-Honeywell R. Co., 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952). 6

Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372 (1904). . . . 9

Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119, ___ S.Ct. ___ (1908). . 9

INDEX OF AUTHORITIES (Cont.)

Page

Constitutional Provisions

Constitution of United States, Amendment V. 3, 14

Constitution of United States, Amendment XIV, Section 1 . . . . . 3, 14

Constitution of Oregon, Article I, Section 18. . . . . 3, 14

Constitution of Oregon, Amended Article VII, Section 3. . . . . 2, 8

Statutory Provision

28 U.S.C. § 2101(c) 3, 6

Texts and Treatises

65 CJS 271, Navigable Waters, § 86. . 9, 10

Farnham, Waters and Water Rights, § 847, p 2492 9

History and Law of the Foreshore and Seashore (3d Ed.) 13

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF FOR RESPONDENT CORVALLIS SAND AND GRAVEL COMPANY IN OPPOSITION

Respondent, Corvallis Sand and Gravel Company, opposing the issuance of a Writ of Certiorari, prays for denial of the Petition.

Petitioner's citations to Opinions Below, Statutes Involved, and Appendices are accurate and adequate when read in conjunction with Respondent's previous Petition For a Writ of Certiorari to the Supreme Court of the State of Oregon, No. 75-577, which Petition and all Appendices are hereby incorporated by this reference.

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court summarily dismiss the State's Petition for Writ of Certiorari when it was not timely filed within 90 days of the last Oregon Supreme Court action relative to the question raised for review?

2. Is the affirmation by the Oregon Supreme Court of the trial court's finding that the change of channel in the Willamette river was avulsive contrary to the decision of this court in Bonelli Cattle Co. v. Arizona?

JURISDICTION

Respondent denies that this Court possesses jurisdiction to hear and review petitioner's claim inasmuch as petitioner failed to file its petition within 90 days of the date of the last act of the Oregon Supreme Court relative to the question now presented. For purposes of brevity and simplification, respondent sets forth the factual basis and contentions relative to this assertion under its first reason for denying the writ, infra.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Oregon, Amended Article VII, Section 3:

> "JURY TRIAL; RE-EXAMINATION OF ISSUES BY APPELLATE COURT; RECORD ON APPEAL TO SUPREME COURT; AFFIRMANCE NOT WITHSTANDING ERROR; DETERMINATION OF CASE BY SUPREME COURT. In actions at law, where the value in controversy shall

> exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict ***."

Constitution of Oregon, Article I, Section 18:

> "PRIVATE PROPERTY OR SERVICES TAKEN FOR PUBLIC USE. Private property shall not be taken for public use, nor the particular services of any men be demanded, without just compensation; ***."

Constitution of United States, Amendment XIV, Section 1:

> "*** nor shall any state deprive any person of life, liberty, or property, without due process of law ***."

Constitution of United States, Amendment V:

> "No person shall***be deprived of life, liberty, or property, without due process of law;".

STATEMENT OF THE CASE

Respondent relies upon its Petition for Writ of Certiorari filed heretofore. In addition, it calls the following facts to this Court's attention:

1. Facts Concerning Lack of Jurisdiction Occasioned by Untimely Filing

Petitioner State of Oregon computes the 90-day period allowed under 28 U.S.C. § 2101(c) as commencing with the denial by the Oregon Supreme Court of respondent Corvallis Sand and Gravel Company's Motion to Withdraw or Suspend Clarification of Opinion set forth in petitioner's Appendix C (Pet. 2) This motion in no way related to the issue of what constitutes an avulsive change, the basis of the petition of the State of Oregon. The motion dealt with the location of the downstream end of the avulsive channel. (A. 19)

2. Facts Concerning the Avulsive Alteration of the Channel

Respondent Corvallis Sand and Gravel Company is the record owner of the disputed land under the new channel of the Willamette River.

Respondent and its predecessors in title were at all times riparian owners of the disputed property upstream from the area where the river broke through in 1909, and were record title holders of the land over which the river flows in the avulsive channel established in 1909.

Petitioner acknowledges that the 1909 flood was one of the "extraordinary floods" which occurred in this area (Pet. 5). Petitioner also acknowledges:

> "In the Corvallis area banks under 20 feet were covered by high water whereas during extreme high water the whole valley was overflowed." (Pet.5)

Petitioner further concedes that the trial judge found that the change of channel in 1909:

> "*** was not gradual and perceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion." (Pet. 9)

Petitioner requests this Court to overturn that factual finding. While the action was one at law, the parties stipulated that it should be tried to the court sitting without a jury. The trial judge, as the trier of facts, made the quoted finding.

REASONS FOR DENYING THE WRIT

1. THE PETITION FOR WRIT OF CERTIORARI OF THE STATE OF OREGON WAS NOT TIMELY FILED AND SHOULD BE DISMISSED.

This Court stated the pertinent rule:

> "Thus, while we do not mean to encourage application for piecemeal review by today's decision, we do mean to encourage applicants to this court to take heed of another principle -- the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. These statutes are not to be applied so as to permit a tolling of their time limitations because some

event occurred in the lower court after judgment was rendered which is of no import to the matter to be dealt with on review."

> Federal Trade Commission v. Minneapolis-Honeywell R. Company, 344 U.S. 206, 97 L.Ed. 245, 252, 73 S.Ct. 245 (1952)

See also Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974) and Cornish v. Richland Parish, 479 F.2d 37, 39 (5th Cir. 1973).

At no time after June 12, 1975 (the date of the decision of the Supreme Court of the State of Oregon), did petitioner seek to perpetuate its contention that the change in the channel of the Willamette River was not avulsive and that the state of Oregon owned the land underlying the present channel. While it filed a Petition for Rehearing, this petition contended only that the location of the channel had been erroneously determined. Petitioner does not rely on its Petition for Rehearing; instead it relies on a motion filed by the respondent which in no way related to the issue here presented.

Under these facts, the 90-day period commenced June 12, 1975, and was not tolled by any subsequent petition or motion; the 90 days expired September 10, 1975 and petitioner's petition, filed on October 14, 1975, fails to comply with 28 U.S.C. § 2101(c).

2. BECAUSE THE CHANGE OF CHANNEL OF THE

WILLAMETTE RIVER WAS AVULSIVE AS A MATTER OF FEDERAL LAW, AND BECAUSE THE CASE OF BONELLI CATTLE CO. v. ARIZONA, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517, DID NOT INVOLVE THE ISSUE OF NATURAL AVULSIVE CHANGES, THE DECISION OF THE OREGON SUPREME COURT IS NOT CONTRARY TO BONELLI.

A. Petitioner contends that the decision of the Supreme Court of the State of Oregon is contrary to Bonelli, supra. The stated basis of conflict is that Bonelli, supra, declared that:

> "In order for the States to guarantee full public enjoyment of their navigable water courses, it has been held that their title to the bed of a navigable stream mechanically follows the river's gradual changes in course." Bonelli 414 U.S. at 318 (Pet. 11)

The context of the quote is a discussion of classic accretion where a river moves gradually through the process of erosion. As such it is irrelevant to the facts in this case wherein the main channel of a river cut across the neck of a peninsula and occupied a new channel leaving a substantial quantity of land intervening between the former channel and the new channel (Pet. 20, Fig. 3). This is a classic avulsion. Bonelli, supra, did involve an avulsive change, but the change was brought about artificially by the Corps which narrowed the channel of the river.

Bonelli, supra, did not involve an

abandonment of an existing channel which is the problem here presented. The facts being entirely different, there is no conflict and no basis for jurisdiction in this Court.

B. The Constitution of Oregon provides in part as follows:

AMENDED ARTICLE VII:

"SECTION 3. JURY TRIAL; RE-EXAMINATION OF ISSUES BY APPELLATE COURT; RECORD ON APPEAL TO SUPREME COURT; AFFIRMANCE NOT WITHSTANDING ERROR; DETERMINATION OF CASE BY SUPREME COURT. In actions at law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict ***." (Emphasis supplied.)

The Oregon appellate courts found there was evidence to support the finding and left it undisturbed (Pet. 10). On this state of the record and law the finding is binding and forecloses the granting of the petition.

C. Petitioner urges that despite the finding, the change was not avulsive as a matter of law because the river did not flow exclusively in the new channel immediately after the 1909 flood. (Fig. 3, Pet. 20, shows that by the time of the USGS survey of 1911-13 almost all of the river flowed in the new channel.) Petitioner further

contends that the change is not avulsive because there was water flowing in the new channel commencing in about 1890 when the river was four to five feet above normal water. Petitioner did not include in its facts the testimony of Fred Fischer, its witness, that water flowed in the "gully" (the new channel) "only during the rainy season". (Tr. 392) Nor did the petitioner point out that the 1890 Corps survey by Clapp described the new channel as a "hi-water chute". (Ex. 62) The "gully" became the new channel of the river in 1909 during a major flood.

The principle that an avulsive change of channel works no change in the ownership of the underlying fee is as ancient as the Roman law. See historical discussion Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L. Ed. 372 (1904).

The following authorities support the ruling of the Oregon appellate courts that even though a change in channel may take place over a period of years it is nevertheless avulsive: 65 CJS 271, Navigable Waters, § 86; Farnham, Waters and Water Rights, § 847; p. 2492; Missouri v. Nebraska, supra, Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119, 136, ___ S.Ct. ___ (1908); Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920); Anderson-Tully Co. v. Franklin, D.C. (N.D.-Miss. 1960), 307 F. Supp 539; Durfee v. Keiffer, (Neb.) 95 NW2d 618 (1959).

The rule is stated as follows:

"However, when a navigable stream

changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, title to riparian lands, which may have become islands, remains unaffected, notwithstanding the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of the waters passing through the old channel until finally the new channel became the main channel of navigation."

65 CJS 271, Navigable Waters, § 86

Commissioners v. United States, supra, represents a leading authority. Although the change from the old to the new channel there extended over approximately 50 years, the Eighth Circuit applied the principle that the change was avulsive.

Commissioners, supra, cited Washington v. Oregon, supra, a proceeding in which the State of Washington brought a suit in equity to settle the boundary dispute between the states in the area of the mouth of the Columbia River. Historically, two channels, the north channel and the south channel, existed

at this location. Upon admission of Oregon to the Union, the north channel was designated as its north boundary. When Washington was admitted, the same channel was designated as its south boundary. Over a period of many years the north channel filled in and the south channel became the channel of navigation. Washington contended that this change brought about a change of boundary enlarging the area of that state. The Supreme Court rejected the contention, 53 L.Ed. at 136:

> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river."

Durfee v. Keiffer, supra, cited Commissioners, supra, with approval, and followed it.

In Anderson-Tully, supra, the court observed, at 541-52:

> "3) "Avulsion is a change in a boundary stream so rapidly or so suddenly

made, or in such a short time, that the change is distinctly perceptible or measurably visible at the time of its progress. Or to state it otherwise, so far as concerns practical purposes, when the change is not by accretion, it is by avulsion." Sharp v. Learned, 1943, 195 Miss. 201, 14 So.2d 218, 220. In Missouri v. Nebraska, 1904, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed.372, 375, the Supreme Court of the United States said: "In the latter case, the court, after referring to the rule announced in New Orleans v. United States [10 Pet. 662, 9 L.Ed. 573], and citing prior cases in which that rule has been recognized, said: 'It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould, Waters, § 159, it is said: "But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates"'". (Emphasis supplied.)

In the present case, the change did not result from a gradual and imperceptible movement of the bed; instead, it occurred during a major flood which established a new channel, leaving land intervening between the old channel and the new. As such it could not be an accretion. Anderson-Tully, supra. Being an avulsion there is no change of ownership underlying the bed of the new channel: Mr. Digges' arguments (1568-9), History and Law of the Foreshore and Seashore, (3d Ed., Moore & Hall, published by Sweet & Maxwell, London, 1888); Sir Matthew Hale "DeJureMaris", History and Law of the Foreshore and Seashore, (3d Ed.) page 371; Bonelli, supra, 38 L.Ed.2d at 539.

The rule of retention of title because of the avulsive encroachment of a new channel has its origins in antiquity and rests upon good sense. Why should a man lose title to his land because a river now flows over it? If the land contains valuable deposits of mineral or oil, should he be denied the benefits of those deposits because of the presence of the water? Should the state take title to land which it does not require for the purpose of protecting the public interests of navigation and fishery? (The bed is subject to the navigational servitude even though it is privately owned. Bonelli, supra, 38 L.Ed.2d at 542.) The answer to each of these inquiries is clearly "no".

The state would enlarge that servitude into a fee title, something unknown to the law, wholly unprecedented and completely unjustifiable.

There is yet another reason why the state does not acquire title to the privately owned land underlying the new bed. To grant it title would be to take property in violation of due process and without compensation, both of which are forbidden by the Constitution of Oregon and by the Constitution of the United States. Article I, Section 18, Constitution of Oregon; Amendment XIV, Section 1, and Amendment V, Constitution of United States, supra. This Court in Bonelli, supra (38 L. Ed.2d at 541), expressed concern over the taking of property by judicial decree.

The unstated, but real, objective of petitioner is to acquire title to the sand and gravel materials in the bed of the new channel, not for the purpose of protecting the public rights of navigation and fishery, but to enable it to engage in the business of selling those materials. This Court has already ruled that the state does not own those materials. Bonelli, supra (38 L.Ed.2d at 536).

CONCLUSION

The petition should be dismissed because it was not filed within 90 days of the date the Oregon Supreme Court last ruled on the issue of whether the change of channel was by avulsion or by accretion.

If the petitioner's proposition that the state owns where the river has been, where it is now and wherever it flows in the future is approved, the result will be endless litigation, not alone as to the Willamette River

which historically has traversed large sections of the Willamette Valley, but also all other dynamic rivers. Much of the property is dry land. The dispute will be endless. All the while, no aspect of the public interest of navigation and fishery will be served thereby.

The state should be limited, at most, to the present location of the river to the extent that it can establish that no avulsive change has taken place which resulted in the river flowing over property which is privately owned.

The seeking by the state of additional sources of sand and gravel and real estate for the purpose of profitable enterprise is abhorrent to the established concepts that the state cannot take property without compensation and that the state's proper and limited interest is to protect the public rights of navigation, fishery and similar uses.

Petitioner's position is also contrary to Bonelli, supra, which declared that the state can only claim title to that property which is necessary for the protection of navigation. The fee being determinable, excess land vests in the riparian owner.

Petitioner seeks to invoke the jurisdiction of this Court by contending that the decision of the Supreme Court of the State of Oregon is contrary to Bonelli, supra. Bonelli, supra, did not deal with the establishment of an entirely new channel by forces of nature

unleashed during a great flood; nor did Bonelli, supra, hold that where a river flows over private land the state acquires ownership of the land. There being no conflict, there exists no basis for review by this Court. In fact, there can be no conflict between the present decision of the Supreme Court of the State of Oregon and Bonelli, supra, because the decision of the Oregon court conformed to the established federal law of avulsion.

Petitioner contends that the law grants to it ownership of the land underlying the new bed. It cites no authority for such a proposition. None exists.

This Court should deny the petition.

Respectfully submitted,

ROBERT MIX
745 N.W. VanBuren
Corvallis, Oregon 97330
Counsel for Respondent

RIDGWAY K. FOLEY, JR.
SOUTHER, SPAULDING, KINSEY,
WILLIAMSON & SCHWABE
1200 Standard Plaza
Portland, Oregon 97204
Of Counsel

October 1975

APPENDIX A

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff-Appellant and Cross-Respondent, vs CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant-Respondent and Cross-Appellant.	MOTION TO WITHDRAW OR SUSPEND CLARIFICATION OF OPINION Benton County 21512

Defendant shows the following to the court:

1. Plaintiff, at the trial of the 1958 quiet title suit, entered into evidence a map prepared by it (Ex. 260 herein) which established the downstream end of Fischer Cut as being located at the confluence of the now main channel of the Willamette river and East river.

2. At all times subsequent to the filing of its original Complaint herein in 1965, and throughout the trial of this case and during the period of its appeal in the court of appeals the plaintiff continued to maintain that the said confluence represented the downstream end of Fischer Cut. Plaintiff, on or about February 28, 1975, for the first time,

changed its position to contend that Fischer Cut extends downstream from said confluence.

3. Defendant at all times relied upon the position of the plaintiff as to the location of the downstream end of Fischer Cut as being the said confluence.

4. Based on this reliance, the defendant admitted in its pleading that it claimed no interest in the portion of the river designated as Parcel 3 or any portion of the bed downstream from Parcel 3.

5. To bind the defendant to the admissions in its pleadings of non-ownership of the portion of the bed below the said confluence will work a great hardship upon the defendant in that it will be deprived of valuable property.

6. The defendant has never had an opportunity to explain the reason for its inadvertent admissions that the plaintiff owned the bed of the river below said confluence.

7. The law provides that parties litigant are to be relieved from the admissions set forth in their pleadings where there is no gross negligence on the part of the pleader. 71 CJS 154, Pleading, Section 59 (f) citing Bunting Tractor Company, Inc. vs Roy L. Houch Sons' Corporation, 253 Or 517, 454 P2d 651 (1969).

Defendant moves the court for an order as follows:

1. Permitting the defendant to withdraw the admissions contained in its pleading which serve as the basis for the clarification of the original opinion herein.

2. Withdrawing the clarification of the former opinion herein.

3. In the alternative, authorizing the defendant within twenty (20) days to present evidence to the court in the form of a brief establishing that it was misled by the plaintiff and that the defendant had reasonable grounds for relying on the plaintiff's position that the confluence of the present main channel and East river represented the downstream limit of Fischer Cut.

/s/ ROBERT MIX
Attorney for defendant-respondent and cross-appellant

I hereby certify that I served the foregoing Brief for Respondent Corvallis Sand and Gravel Company in Opposition on Peter Herman, of attorneys for petitioner on the day of November, 1975, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

_____

Robert Mix
Attorney for Respondent

Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

vs.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF FOR PETITIONER STATE OF OREGON

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

vs.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF FOR PETITIONER STATE OF OREGON

Respondent challenges the timeliness of the State of Oregon's petition for certiorari.

That petition was docketed on October 14, 1975. The Oregonn Supreme Court's denial of the petitions for rehearing of both parties was on July 17, 1975 (Appendix to petition, p. 28). The petition, therefore, was filed within 90 days of the Supreme Court of Oregon's denial. It was that court's denial of the petitions for rehearing that rendered the judgment of the court final and reviewable (Appendix B to petition, p. 28).

Had the Supreme Court not responded favorably in its opinion to the State of Oregon's petition, or had the Oregon Supreme Court responded favorably to the defendant's petition for rehearing, the State's petition for certiorari would have had to include additional matters and arguments.

Respectfully submitted,

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel

Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR PETITIONER

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: 503/378-4758
Counsel for Petitioner

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Question Presented

In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding is carrying the major portion of the river's flow, and the other channel eventually becomes unusable, does federal law deprive the public of title to the beds of both channels?

Statute Involved 2

Statement of the Case 3

A. General Background 3

B. Facts Material to the Question Presented 5

C. Manner in which the Federal Question Was Presented 8

Argument

I The immensely significant values inherent in Oregon's navigable waterways, both tangible and intangible, require that full and complete ownership of such waterways be in the public 11

II Full public enjoyment in the sense defined above of the navigable watercourses within a state is not possible if a principle of avulsion is to be applied in other than very rare cases as a limited exception to public ownership 16

III Even if classic avulsion principle is applied to this case, the undisputed facts in the record and found by the trial court negate an avulsion because the changes that occurred were erosive in nature and were neither unusual nor uncharacteristic of the river 20

Conclusion 27

Appendix 29, 35

TABLE OF AUTHORITIES

Cases Cited

	Page
Arkansas v. Tennessee, 246 US 158 (1918)	25
Bonelli Cattle Co. v. Arizona, 414 US 313 (1973)	passim
Bowlby v. Shively, 22 Or 410 (1892), *aff'd sub nom* Shively v. Bowlby, 152 US 1 (1893)	3, 11, 12
Commissioners v. United States, 270 F 110 (8th Cir 1920)	22, 23, 24
Denny v. Cotton, 3 Tex Civ App 634, 22 SW 122 (1893)	26
Hancock v. Moore, 135 Tex 619, 146 SW2d 369 (1941)	25
Illinois Central Railroad v. Illinois, 146 US 387 (1892)	12
Jefferis v. East Omaha Land Co., 134 US 178 (1890)	25, 26
Marks v. Whitney, 98 Cal Rptr 790, 491 P2d 374 (1971)	13
Martin v. Waddell, 41 US 367 (16 Pet 1842)	3, 11
Mumford v. Wardwell, 73 US 423 (6 Wall 1867)	3, 11
Nebraska v. Iowa, 143 US 359 (1892)	17, 26
Oklahoma v. Texas, 260 US 606 (1923)	26
Pannell v. Earls, 252 Ark 385, 483 SW2d 440 (1972)	27
Philadelphia Co. v. Stimson, 223 US 605 (1912)	25
Pollard's Lessee v. Hagan, 44 US 212 (3 How 1845)	3, 11
Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964)	17
Smith v. Maryland, 59 US 71 (18 How 1855)	12
State v. Corvallis Sand and Gravel Co., 18 Or App 524, 526 P2d 469 (1974), S Ct *aff'd*, 75 Adv Sh 2068, 272 Or 545, 536 P2d 517, 75 Adv Sh 2562, 272 Or ——, 538 P2d 70 (1975)	passim
State v. McVey, 168 Or 337, 121 P2d 461, 123 P2d 181 (1942)	3
State v. R. E. Janes Gravel Co., 175 SW2d 739 (Tex Civ App 1943)	18

TABLE OF AUTHORITIES—Continued

Cases Cited—Continued

	Page
State ex rel Commrs. of Land Office v. Warden, 200 Okla 613, 198 P2d 402 (1948)	25
United States v. Oregon, 295 US 1 (1935)	3, 17
Wear v. Kansas, 245 US 154 (1917)	14
Wood v. McAlpine, 85 Kan 657, 118 P 1060 (1911)	25, 26

Constitutional and Statutory Provisions

US Const, art I, §8	11
Or Const, art VIII, §5	15
29 USC § 1257(3)	2
11 Stat 383	3, 12
ORS 273.031	15
ORS 273.041	15
ORS 274.025	15
ORS 274.040	15
ORS 274.530	15
ORS 274.615	15
ORS 274.710	15
ORS 274.885	15
ORS 274.915	15
ORS 390.310-390.368	14
ORS 390.314	14
ORS 390.318(3)	14

Other Authorities

Tiffany, The Law of Real Property, §1220 (3d ed 1975)	18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR PETITIONER

OPINIONS BELOW

The trial court's memorandum opinion is reprinted in the Appendix at 167.

The opinion of the Oregon Court of Appeals affirming in part and reversing in part the judgment of the trial court is reported at 18 Or App 524, 526 P2d 469 (1974) and is reprinted in the Appendix at 195.

The opinion of the Oregon Supreme Court is reported at 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975) and is reprinted in the Appendix at 233.

The clarifying opinion of the Oregon Supreme Court denying the Petitions for Rehearing is reported at 75 Adv Sh 2562, 272 Or 545, —, 538 P2d 70 (1975) and is reprinted in the Appendix at 240.

JURISDICTION

On June 12, 1975, the Oregon Supreme Court entered its opinion affirming the judgment of the Oregon Court of Appeals as modified. (A 233).

On July 17, 1975, the Oregon Supreme Court, in a clarifying opinion, denied timely petitions for rehearing filed by both parties. (A 240).

This petition for a writ of certiorari was filed on October 14, 1975, which was within 90 days of that date, pursuant to Rule 22(3) and the provisions of 28 USC §1257(3) under which the jurisdiction of this Court is invoked.

QUESTION PRESENTED

In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding is carrying the major portion of the river's flow, and the other channel eventually becomes unusable, does federal law deprive the public of title to the beds of both channels?

STATUTE INVOLVED

11 Stat 383 provides that:

> "That Oregon be, and she is hereby, received into the Union on an Equal footing with the other States in all respects whatever, with the following boundaries: . . ."

STATEMENT OF THE CASE

A. General Background

The Willamette River is a navigable river within the state of Oregon. In 1859, Oregon was admitted into the Union "on an [e]qual footing with the other states in all respects whatever . . . ." 11 Stat 383. By virtue of that statute which incorporated the equal footing doctrine, Oregon, acquired title to those lands under navigable waters within the state. *See Bonelli Cattle Co. v. Arizona,* 414 US 313, 318 (1973); *Shively v. Bowlby,* 152 US 1, 26 (1893); *Mumford v. Wardwell,* 73 US 423, 436 (6 Wall 1867); *Pollard's Lessee v. Hagan,* 44 US 212, 221, 223, 228-229, 230 (3 How 1845); *Martin v. Waddell,* 41 US 367, 410 (16 Pet. 1842). Oregon thus acquired at statehood the title to the beds of all rivers then navigable within its boundaries. *United States v. Oregon,* 295 US 1, 14 (1935).

Under Oregon law, the state owns the beds of navigable rivers between high water marks and the upland or abutting riparian owners have no title to the beds of such river unless and until the state is shown to have parted with title as by statutory grant or deed. *State v. Corvallis Sand & Gravel Co.,* 18 Or App 524, 526 P2d 469, 479-480 (1974), S Ct *aff'd* 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975); *State v. McVey,* 168 Or 337, 345-348, 121 P2d 461, 464-466, 123 P2d 181 (1942); *Bowlby v. Shively,* 22 Or 410, 415-416, 419, 427-428 (1892), *aff'd sub nom Shively v. Bowlby,* 152 US at 52, 56-58 (1893).

This case arises because the state, by amended complaint (A 5), brought ejectment to recover from the Corvallis Sand and Gravel Co. (corporation) the possession of various parcels comprising the present riverbed of the Willamette River, including parcels comprising "Fischer Cut" to which the state claimed ownership by virtue of its sovereignty. Fischer Cut is now the main channel of the river, but prior to 1910 was a subsidiary channel across the neck of Fischer Island. (A 40 and 41).

With exceptions not here material, the trial court ruled in favor of the state on all the parcels claimed except for parcels 2A, 2B and 2C and a portion of parcel 3 which the trial court held were part of Fischer Cut and avulsive and, therefore, belonged to the corporation. (A 170-172).

Both parties appealed. The Oregon Court of Appeals affirmed. (A 195). On review, the Oregon Supreme Court affirmed the Court of Appeals on the issue of avulsion but modified that court's holding as to the length of the avulsion and as to damages. (A 233, 240).

B. **Facts Material to the Question Presented**

1. *Characteristics of the River.*

The Willamette River is a typical meandering river subject to frequent changes in course. (Tr 1044-1045). It was said that "the Willamette above Corvallis is cut up into so many useless sloughs and at each liable to undergo very marked and frequent changes, it would be impossible to confine its waters in one main and per-

manent bed. New channels are not infrequently cut out and old ones have been left nearly bare; the latter after being closed for years are again reopened." (Ex 115 at 765; A 149, Tr 66, 413). Contributing to its instability were banks of a "loose sandy soil or gravel" which were "constantly caving and precipitating trees into the river" (Ex 112-A at 5; A 115, Tr 291, 292, 325) with the result that natural wingdams formed, new islands and channels were constantly being created and channel changes occurred at some locations "year to year." (Ex 94-A at 3-5, A 86-90, Tr 291, 292, 325; Ex 114 at 907, A 121-122, Tr 65-66, 412-413; Ex 115 at 765-766, A 149-150, Tr 65-66, 412-413; Ex 115 at 655, A 161-162, Tr 66, 413, 521-522). Frequent changes of course also occurred in the Corvallis area which was a typical reach of the river. (Ex 94-A at 3-5, A 86-90, Tr 291, 292, 325, 521-522, 779). A factor in this process was recurrent winter flooding (Ex 114-C at 2848, A 128-129, Tr 292, 325) caused by a rainy season occurring between October and June (Ex 115 at 654, A 160, Tr 65-66, 412-413) with major floods occurring in 1861, 1890, 1893, 1894, 1901, 1903, 1907 and 1909. (Ex 71 at 8-9, 162, 174, 202, 203, A 69-78, Tr 109, 111; Ex 94-A at 7, 9, A 92, 93-94, Tr 291, 292, 325, 434). In the Corvallis area banks under 20 feet were covered by high water and during extreme high water the whole valley was overflowed. (Ex 94-A at 2, A 85-86, Tr 291, 292, 325; Ex 112-A at 5, A 115, Tr 291, 292, 325; Ex 114-C at 2848, A 128, Tr 292, 325, 394, 396, 1032-1035).

2. *Formation of Fischer Cut.*

In 1853 and thereafter, the Willamette River at

Corvallis coursed around a peninsula-like formation, or oxbow, which later became Fischer Island. (Ex 59, A 38, Tr 216, 217). Exhibit 59 itself shows evidence of minor erosive channels or gullies near the neck of the oxbow. By 1887, the erosive channels or gullies were more pronounced. (Ex 51, A 39, Tr 221, 222).

In 1890, an overflow channel about 3200 feet in length was discovered flowing across the neck of the peninsula. (Ex 98-A at 2, A 102, Tr 291, 292, 325; Ex 62, A 40, Tr 223, 224). Water commenced to run in this channel at the five-foot stage. (Ex 114-C at 2849, A 132, Tr 225, 292, 325). It was noted in an early official report in 1890 that if the overflow channel "were cleaned of the drift-wood and willow growth, so as to give *the high water a free channel, I think that the water would enlarge it very much and probably change the course of the river of its own accord as it is a direct chute and the material of a sandy nature.*" (Ex 98-A at 2, A 102, Tr 291, 292, 325) (emphasis supplied).

This report was followed by another in 1892 which noted that at Corvallis the valley bottom consisted of three channels for low water discharge and also "sloughs, high water channels and old riverbeds, that serve as outlets for the water at medium and ordinary high water stages." (Ex 114-C at 2848, A 128, Tr 292, 325; 299-300). The report noted the sandy nature of the chute, its natural enlargeability by the river if it were cleared of debris and that "in time the low water flow of the river may take this course." (Ex 114-C at 2849, A 132-133, Tr 292, 325; 304).

The effect of the floods of 1893, 1894, 1901 and 1903 and normal winter flooding was to deepen and enlarge the overflow channel so that by 1906 an estimated one-fourth of the river was flowing through this channel[1] at only the four-foot stage. (Ex 110-A, A 103, 104, Tr 231; 225). Also, the banks of the overflow channel were "caving" eastward (to the right) toward Fischer Island away from the firm left bank, the "Seavy" side. (Ex 110-A at 2, A 104, Tr 231; 387, 390, 404, 514, 702-703).

Fischer Island and Fischer Cut were owned by the Fischer family. (A 52-53, Tr 398, 399). Fred Fischer, their son, testified no one cleared the overflow channel of the trees and debris—natural winter flooding did this (A 58, Tr 404). Fischer testified:

"Q. I see. *Did this gully enlarge during the years?*

"A. O, yes, it kept going in all the time now.

"Q. When you say kept going in—

"A. Going, going east.

"Q. *You mean moving toward Fischer Island?*

"A. *Yes, taking soil away from us.*

"Q. I see.

"A. Probably as much as, oh, that area, *I should judge we lost through that Fischer Cut probably 60 acres.*

"Q. You mean the water eroded this away?

"A. *Yeah, in time, or a period of five years anyway.*

"Q. I see.

"A. *Before it broke through* and it kept gradually—gradually—and finally the steam boat used to

[1] The trial court found this as a fact. (A 181).

go around here." (A 48, Tr 394-395). *See also* A 57, Tr 403 (emphasis supplied)[2]

Following further major floods in February 1907 and November 1909 (Ex 71 at 162, 174, A 76, 78, Tr 109, 111; 1032-1033, 1034, 1035), witnesses viewing the area in 1910 or 1911 observed the "main body of the river" flowing in the Fischer Cut area (Tr 879-881, 939-940) while the river still ran "quite a lot" around the old channel (Tr 880, 939-940), which eventually dried up. (*Compare*, Ex 3, 1969 aerial photograph, Tr 332; *with* Ex 15, 1936 aerial photograph, Tr 246). A United States Geological Survey Map of 1911-1913 shows the new configuration of the river after the change. (Ex 54 and 257, A 41, Tr 236, 1088, 1089).

C. Manner in Which the Federal Question Was Raised

In its amended ejectment complaint (A 5), the state alleged the parcels comprising Fischer Cut were part of the riverbed and owned by it by virtue of its sovereignty. In its testimony the state asserted that Fischer Cut was formed by erosion and was not avulsive. (Tr 296, 514-515). In its briefs in the trial court the state asserted that what occurred at Fischer Cut was a process of erosion and submergence, not avulsion and

[2] The Oregon Supreme Court interpreted Fischer's testimony (A 42-59, Tr 389-405) as failing "to explain whether the erosion he referred to occurred before or after the 1909 flood" 536 P2d at 519. The testimony and exhibits referred to above render this interpretation incorrect particularly because the major erosive floods occurred prior to 1910 without another major flood until 1923. *See* US Army Corps of Engineers, Flood Plain Information, Corvallis and Philomath, Oregon at 2 (March 1971). *See* Appendix A to this brief. *See also* Tr 434, 1033-1035. Also, the banks of the Cut were "caving" in January of 1906, almost four years before the final change. (Ex 110-A at 2, A 104, Tr 231).

that an avulsion did not arise where there was enlargement of an existing channel.

The trial court, however, while finding that Fischer Cut had existed as early as 1890, and while finding that it carried one-fourth of the river's volume in January of 1906 (A 180-181), nevertheless found that

> "6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence *converted Fischer Cut into the main channel of the river.*
>
> "7. The change was not gradual and perceptive *but was a rapid and violent change of course, avulsive in character* and constituted an avulsion." (A 181) (emphasis supplied).

The state in its opening appeal brief in the Oregon Court of Appeals stated the issues to be:

> "1. Where the smaller of two channels of a navigable river carries one-fourth of the river's flow, does the river's sudden enlargement and conversion of the smaller channel, so that it becomes the channel carrying the larger volume constitute an avulsion?
>
> "2. Was there any evidence before the trial court from which the trial court could have concluded that the enlargement 'Fischer Cut' into the river's main channel was sudden and avulsive?"

The state then assigned as error the trial court's award of title to the disputed area to the corporation (App Br 2, 3, 26, 34).

The state, both in its briefs in the Court of Appeals and in its petition for review to the Oregon Supreme Court, argued that the changes that occurred at Fischer Cut were ordinary and usual, were but the culmination of a 20-year process of continuous erosion and submerg-

ence and that the sudden enlargement of that channel did not constitute an avulsion (App Br 23-25, 26-43; App Rep Br 1-22; App Pet Rev 1-31).

Nevertheless the Court of Appeals found "evidence in the record to support" the trial court's conclusion of an avulsion, 526 P2d at 476 (A 206) and the Supreme Court agreed, 536 P2d at 518 (A 234). The "evidence" in the record consisted of testimony by one witness as to "comment or talk about the river having broken through," (Tr 939), testimony by another witness over objection that "a friend of mine told me that he could step across the creek there in 1907 . . . and in 1909 he said the water broke through and made the river there" (Tr 866), testimony by Fred Fischer as to the river's eroding Fischer Cut eastward toward the right toward Fischer Island "before it broke through," (A 48, Tr 394-395) and testimony by the corporation's expert that "an avulsive change of channel took place rather than a progressive breaking down of the land in the vicinity of what is now called Fischer Island." (Tr 1091).

None of this "evidence" however, purported to explain or contradict the existence of the channel (Fischer Cut) in 1890 long before the so-called breakthrough.

ARGUMENT

I

THE IMMENSELY SIGNIFICANT VALUES INHERENT IN OREGON'S NAVIGABLE WATERWAYS, BOTH TANGIBLE AND INTANGIBLE, REQUIRE THAT FULL AND COMPLETE OWNERSHIP OF SUCH WATERWAYS BE IN THE PUBLIC

In *Martin v. Waddell, supra,* the Court described the rights that the original 13 states acquired in navigable waters within their boundaries.

> "For when the revolution took place, the people of each state became themselves sovereign; and in that character *hold the absolute right to all their navigable waters and the soils under them for their own common use,* subject only to the rights since surrendered by the constitution to the general government. . . ." 41 US at 410 (emphasis supplied)

Except for the right of Congress under the constitution to regulate commerce among the several states and between foreign nations (US Const, art I, §8) the soils under navigable waters were not granted by the Constitution to the United States, but were reserved to the several states. *Pollard's Lessee v. Hagan, supra,* 44 US at 230; *Mumford v. Wardwell, supra,* 73 US at 436. Thus states admitted to the Union since the revolution acquired from the United States, by virtue of the equal footing doctrine incorporated in their admission acts, full title to the navigable waters and the soils under them. *Shively v. Bowlby, supra* 152 US at 26, 57-58; *Bonelli Cattle Co. v. Arizona, supra,* 414 US at 318.

See, for example, 11 Stat 383 quoted at 3, *post.*

The title the states thus acquired was

> ". . . held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. . . . [citations omitted]. *The State holds the propriety of this soil* for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. . . . [citations omitted]*" *Smith v. Maryland,* 59 US 71, 74-75 (18 How 1855). (emphasis supplied)

It was also a title

> ". . . different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. *It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein* freed from the obstruction or interference of private parties. . . ." *Illinois Central Railroad v. Illinois,* 146 US 387, 452 (1892). (emphasis supplied).

Although these early cases describe the states' title in classic public trust terminology the *Smith* case refers to the state's "duty to preserve unimpaired those public uses for which the soil is held." *Smith v. Maryland, supra* 59 US at 75. The scope of those uses has properly never been specifically delimited and is a flexible concept

as indicated in *Marks v. Whitney,* 98 Cal Rptr 790, 491 P2d 374 (1971) where the California Supreme Court declared:

> "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing or other purposes. [citations omitted]. The public has the same rights in and to tidelands.
>
> "The *public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.* [citation omitted]. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—*is the preservation of those lands in their natural state,* so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. *It is not necessary to here define precisely all the public uses which encumber tidelands.*" *Id,* at 380 (emphasis supplied).

That the public trust is broader than navigation and fishery also appears to be recognized by *Bonelli* which declared that "[t]he extent of the State's interest [in the lands beneath its navigable waterways] should not be narrowly construed because it is denominated a navigational purpose." *Bonelli, supra* 414 US at 323, n 15. Thus, "full public enjoyment" means more than the right of unrestricted passage over and fishing in navigable waterways. It means full and complete use by the public

of the waters *and underlying bed* in all the ways that can conduce to the greatest public good, unrestricted and unobstructed by assertions of private ownership or right.

The Willamette River is a perfect example. Its resources, both tangible and intangible are of immense value and significance to the people of this state. Its navigable portion is some two hundred miles long and perhaps three to four hundred feet in width on the average as it meanders through the Willamette Valley. A scenic waterway of perhaps eight to ten thousand acres in area, it is deemed so important and vital to the people of the state that the legislature enacted special legislation popularly known as the "Greenway Law" to protect it. ORS 390.310 to 390.368. The stated purposes of this legislation define many of the public values inherent in a great navigable waterway, i.e., scenic and recreational values, including the acquisition of parks, preservation of historical sites, structures, facilities and objects and utilization of subsurface mineral aggregate deposits. ORS 390.314, 390.318(3).

Oregon's navigable waterways of course present tremendous opportunities for recreation such as vast areas of scenic open space for human enrichment through boating, fishing, sailing, swimming, wading and the like. But, such waterways also present tremendous commercial[2] opportunities such as the transportation and

[2] This Court in *Wear v. Kansas*, 245 US 154 (1917) upheld the right of the state to exact a charge from those who take sand from the bed of a navigable stream. In our answering brief on the merits in case no. 75-577, we discuss at greater length the state's proprietary interest in its navigable riverbeds and its right to exact a charge on behalf of the public from those who use the bed for private purposes.

storage of logs, the extraction of sand and gravel (ORS 274.530), the extraction of hard minerals (ORS 274.615), the extraction of oils, gas and sulphur (ORS 274.710), the harvesting of kelp and seaweed (ORS 274.885) as well as the sale or lease of submerged and submersible lands for such general purposes as are deemed by the State Land Board to conduce to the greatest public good. Or Const, art VIII, §5, ORS 273.031, 273.041, 274.040, 274.915.[3]

Considering the multitude of purposes and values inherent in Oregon's navigable waterways, it becomes clear that only if the state is the full and complete owner of those waterways and the underlying beds can it *guarantee* that the public shall have *full* enjoyment of all those resources and values. It is perhaps for this reason that a presumption is indulged in against the separation from sovereignty of the state's dominion over navigable waters and its property in the soil under them. *United*

[3] Article VIII, Section 5 of the Oregon Constitution provides:

"(1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of . . . other lands owned by this state that are placed under their jurisdiction by law.

"(2) The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the consideration of this resource under sound techniques of land management."

ORS 273.031 directs the board to carry out the duties prescribed by this constitutional provision. ORS 273.041 creates the Division of State Lands which through its director, officers and employes acting under the State Land Board, manages state-owned lands including lands under navigable waters.

ORS 274.025 declares that title to all lands under navigable streams and lakes in this state which has not become vested in any person is vested in the state of Oregon. ORS 274.040 and 274.915 contain the state's general leasing and sale authority for lands under navigable waters.

States v. Oregon, supra, 295 US at 14. While the state's police power is helpful to a certain extent, no one knows what the constitutional limitations upon the exercise of the police power are. The amount of costly and time-consuming litigation engendered by the exercise of the states' police power under "just compensation" issues attest to the limits of the power and demonstrates that the police power is no substitute for the management control and flexibility inherent in full ownership. Only through complete ownership can the storehouse of values inherent in these waterways be fully utilized.

II

FULL PUBLIC ENJOYMENT IN THE SENSE DEFINED ABOVE OF THE NAVIGABLE WATERCOURSES WITHIN A STATE IS NOT POSSIBLE IF A PRINCIPLE OF AVULSION IS TO BE APPLIED IN OTHER THAN VERY RARE CASES AS A LIMITED EXCEPTION TO PUBLIC OWNERSHIP.

That the public's ownership of its navigable waterways should rest or depend upon the vagaries of a jury or a court finding that an "avulsion" did or did not occur is intolerable and appears to us to be inconsistent with the principle of full state sovereignty over its navigable waterways.

In the first place, when the issue as between a riparian owner and the state is the ownership of the bed of a navigable river, to apply the doctrine of avulsion to resolve that issue is incongruous. The doctrine of avulsion is basically a constructional principle for the ascer-

tainment of the *boundary* of property which abuts on water and is appropriately applied only to fix the boundaries between two riparian owners or between a riparian owner and the river.[5] The doctrine however, should not be used to qualify state sovereignty and ownership over a navigable waterway because of the character of the movements made by the river. In other words, if the boundary issue for riparian property becomes intertwined with the issue of public ownership and control over a navigable waterway, boundary principles should give ground in the interest of full public ownership and control over the waterway. The public interest of many in the waterway is superior to the interest of a single riparian owner.

---

[5] *See* Tiffany, The Law of Real Property, §§1220 at 1074-1075 (3d ed 1975):

> ". . . It appears, however, to be open to question whether there are, properly speaking, any such rules of law [concerning accretion], and whether, so far as the legal effects of such physical changes are concerned, *they are not rather the result of a general rule for the ascertainment of boundaries, a rule of construction, in effect, that if the boundary of land is determinable with reference to the sea or any body or stream of water, the boundary is presumably intended to vary as the particular physical feature referred to may vary, provided the variation is gradual.*"

Concerning avulsion, the same authority notes:

> ". . . in fixing the boundary with reference to the water or some physical feature thereof, it may be presumed that the parties in interest had in mind the probability of its gradual change with the passage of years, but did not have in mind the possibility of a sudden and perceptible change." (footnote omitted) *Id*, §1222 at 1083.

Tiffany points out that a more preferable line of distinction between sudden and perceptible change (avulsion) on the one hand, and gradual and imperceptible change on the other, is whether the identity of the land remains unchanged. *Id* at 1084. This Court appears to have adopted the same view. *Nebraska v. Iowa,* 143 US 359, 362 (1892). *See, Purvine v. Hathaway,* 238 Or 60, 63-64, 393 P2d 181 (1964) for a good state court discussion of the reasons for the distinction between accretion and avulsion as they affect boundaries.

Secondly, allowing the issue of state ownership of the state's navigable watercourses to rest on the question of proof or disproof of an avulsion can only be productive of uncertainty and of complicated litigation. As the statement of facts makes clear, the Willamette River since statehood in 1859 has been subjected to numerous and violent changes. To rest the ownership of that river on the complicated and unpredictable scenario of whether a given portion of the river today is or is not the result of "avulsive" changes, is to convert the splendid patrimony that the state acquired at statehood into a pig in the poke of litigation. The Oregon Supreme Court's struggle with the sole issue of the length and location of Fischer Cut is itself the best example we can give of how difficult this kind of litigation is. See the Oregon Supreme Court opinions in this case at 536 P2d 517 (A 233) and 538 P2d at 70 (A 240).

Finally, the necessary result of such litigation can only be a checkerboard pattern of public and private ownership in the riverbed and less than full public enjoyment of the navigable watercourse.

The clearest solution to the problem pointed out above would, in other than boundary cases, be to make the state's sovereignty and ownership of its navigable watercourses follow the river independent of the character of the changes in the river as sudden or imperceptible. *See State v. R. E. Janes Gravel Co.*, 175 SW2d 739, 741-742

(Tex Civ App 1943).[6] To adopt such a rule, however, this Court would have to modify in part the *Bonelli* rule that the state's "title to the bed of a navigable river mechanically follows the river's *gradual* changes in course." *Bonelli, supra,* 414 US at 318 (emphasis supplied). The modification would be that the public's title to the riverbed (in other than boundary situations between states) would, irrespective of whether a change in the river was gradual or sudden, mechanically follow the river in its various movements. The State of Oregon would deem this a very desirable result, because it would produce certainty in the law, would terminate the need for much litigation and would quiet title to navigable riverbeds in favor of the public interest.[7]

We assume, however, that with pertinent supporting precedent lacking this Court will choose to apply classic avulsion doctrine to riverbed ownership cases. This would perhaps be acceptable if limited to very rare and unusual cases.

---

[6] This Court in part adopted this procedure in *Bonelli* in refusing to apply the state's rule of avulsion and in holding that the public's title to the river followed the river in a case of a reliction that was artificially produced. As far as Oregon is concerned, it is satisfied with the *result* of the *Bonelli* case which kept ownership of the river in the state and gave back to the riparian owner, the newly reemerged former riverbed. We assume that the principle enunciated by *Bonelli* would, as a general rule, deny to the state ownership of a formerly submerged riverbed even though the river had abandoned its former bed avulsively. This result is fine, as long as it flows from recognition by the Court that because the public's interest is where the river is, the public's ownership of the bed should follow the river as it changes.

[7] *See* footnotes 5 and 6 and accompanying text where it is noted that the avulsion concept is a principle for construing or ascertaining water-related boundaries and should not be used as a rule of law to detract from state sovereignty over and ownership of navigable watercourses and the underlying soil.

III

EVEN IF CLASSIC AVULSION PRINCIPLE IS APPLIED TO THIS CASE, THE UNDISPUTED FACTS IN THE RECORD AND FOUND BY THE TRIAL COURT NEGATE AN AVULSION BECAUSE THE CHANGES THAT OCCURRED WERE EROSIVE IN NATURE AND WERE NEITHER UNUSUAL NOR UNCHARACTERISTIC OF THE RIVER.

Notwithstanding the inappropriateness of the avulsion doctrine to determine state ownership of a navigable riverbed, if the doctrine is applied to the uncontradicted facts in the record and found by the trial court it becomes clear that there was no avulsion in this case.

These facts appear in our statement and are for the most part contained in uncontradicted official Corps of Engineers' reports. The cited testimony of the witnesses (most of the references are to the corporation's witnesses) is also uncontradicted and in harmony with the documentary evidence. The trial court's findings are also in harmony with the uncontradicted facts set out herein except that the trial court's conclusion of an avulsion which it drew from those facts is manifestly incorrect as a matter of law for two reasons.

First, where a river flows through two existing channels and eventually converts the secondary channel to the main channel there cannot be an avulsion because there is no sudden abandonment of an existing channel for a wholly new channel (an avulsion), only enlargement of the existing, secondary channel.

Second, what really happened in Fischer Cut, as the uncontradicted, recited facts make clear, was a 20-year process of erosion and submergence, the eventual result of which was that more of the river flowed through Fischer Cut than flowed through the former main channel.

The trial court held this change to be avulsive and the Oregon Court of Appeals found "evidence in the record to support this conclusion." 526 P2d at 476 (A 206). The Oregon Supreme Court agreed. 536 P2d at 518 (A 234). The state has detailed the scraps of "evidence" in the record (page 11) to which the state court must have had reference. This Court should not lend its approval to permitting such "evidence" to determine full state sovereignty and ownership over a navigable riverbed.

Moreover, if this application of the doctrine of avulsion is allowed to stand, then the principle of public ownership of navigable riverbeds enunciated by *Bonelli* has been effectively nullified. *Bonelli* declared that

> "[i]n order for the States to guarantee full public enjoyment of their navigable watercourses, it has been held that their title to the bed of a navigable river mechanically follows the river's gradual changes in course. . . ." (footnote omitted) *Bonelli, supra* 414 US at 318.

The exception to this rule arises only where ". . . 'a stream suddenly and perceptibly *abandons* its old channel' . . ." *Id*, at 327. This exception however does not include enlargement of an existing secondary channel over a 20-year period marked by erosive floods which

by the end of the period have caused a reapportionment of the percentage of the flow of the river through the two channels, the smaller channel becoming the main channel, the former main channel becoming the smaller channel but continuing to flow for a time. (Tr 880, 939-940).

To conclude that this typical series of events constitutes an avulsion is for all practical purposes to nullify the rule of public title to navigable riverbeds.

The Oregon Court of Appeals itself, however, realized that the facts of this case did not fit the principle of avulsion. It said, citing *Commissioners v. United States,* 270 F 110 (8th Cir 1920):

> "*But even if the doctrine of avulsion does not adequately fit the facts in the case at bar,* there is a middle course between the avulsion and accretion doctrines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in Commissioners v. United States, 270 F. 110, 113-114 (8th Cir 1920): . . ." *State v. Corvallis Sand and Gravel Co., supra,* 526 P2d at 476-477 (emphasis supplied).

Commissioners involved a boundary dispute between riparian owners on a non-navigable river which flowed in two channels around an island. Over a period of years the main channel dried up and the island and that channel became one solid mass of land. A boundary dispute arose between owners of the island and riparian owners of the dried-up channel. The court held that the boundary of the riparian owners remained in the centerline of

the old, but still visible, channel, citing the exception to the accretion rule:

> ". . . To this rule, however, *there is a well-established and rational exception.* It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, *but by flowing around this intervening land,* which [the intervening land] never becomes in the meantime its main channel, *and the change from the old to the new main channel is wrought during many years* by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, *the boundary line between the estates remains in the old channel* subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. [citations omitted]." 270 F at 113-114 (emphasis supplied).

The holding, while correct, did not deal with the *Bonelli* rule of movement of the public's title to the bed of a navigable river as the river changes course. If the Arkansas River had been navigable and the issue of bed ownership by the public had also been before the court, *Commissioners* could still have ruled that the public had title to the new main channel's bed even though for boundary purposes the former main channel still served as the boundary between the two riparian owners.

Nevertheless, the Oregon Court of Appeals relied on this case saying:

> "While the court treated this as a form of accretion, the result is the same as avulsion in that the

boundary line was found not moved to the new channel but rather remained in the old main channel. . . .

"*Since the rule of Commissioners yields the same outcome as the avulsive theory, the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state.* . . ." 526 P2d at 477 (emphasis supplied).

The Oregon Supreme Court agreed. 536 P2d at 518. Both courts confused the *Commissioners'* issue of locating the boundary between two riparian owners in a two-channel situation with the issue in the present case which is whether the public's title to the riverbed should follow the river as it flows through a secondary channel, which, over a period of time marked by a typical series of erosive floods becomes the main channel.

The real issue that arises from such misapplication of federal law is whether the public has title to the beds of navigable rivers. All navigable rivers are meandering. (Tr 757, 1044-1045). In the 120 years since Oregon's statehood, the Willamette River has undergone so many changes of course throughout its 200-mile length that to say this typical change was avulsive is to say in effect that the bed of the river as it presently flows, or major portions of such bed, does not belong to the state. Thus the decision means uncertainty as to title, a checkerboard of public and private ownership in the existing riverbeds, uncertainty as to the extent of those ownerships and massive, expensive and complicated litigation to establish title. Moreover, because of the *Bonelli* doctrine that the state's title is to the "[r]iverbed as a bed" it would seem that the state no longer has title to formerly submerged

and submersible lands which the river has abandoned because of such "avulsive" changes. *Bonelli, supra,* 414 US at 322, 328. Thus the state would own neither the old nor the new bed if *Bonelli* means what it seems to say and the Oregon court's misapplication of *Bonelli* is allowed to stand.

If this Court determines that it will deal with the question of public ownership of a navigable riverbed in terms of whether or not an avulsion occurred, then the Court must drastically limit the situations in which avulsion, as distinct from erosion, can be found to have occurred.⊙ In making the distinction between erosion and avulsion the Court must look to the characteristics of the river in question and determine whether the change was characteristic of the river, relatively common and therefore foreseeable (erosive or non-avulsive) or, whether the change was uncharacteristic, unusual and therefore unforeseeable (avulsive). *See, Philadelphia Co. v. Stimson,* 233 US 605 (1912); *Arkansas v. Tennessee,* 246 US 158, 173 (1918); *Jefferis v. East Omaha Land Co.,* 134 US 178, 190 (1890); *State ex rel Comrs. of Land Office v. Warden,* 200 Okla 613, 198 P2d 402 (1948); *Hancock v. Moore,* 135 Tex 619, 146 SW2d 369, 370-371 (1941); *Wood v. McAlpine,* 85 Kan 657, 118 P 1060, 1065

⊙ By definition, an avulsion should be defined so as to exclude the two-channel situation when what was once an existing secondary channel becomes the main channel over a period of time, even though the final event completing the process may be sudden. The reasons: there is no change of channel and creation of a new channel; only enlargement of an existing channel. Moreover, the facts of nature inevitably make this truly a long-term process rather than a sudden event. *Commissioners v. United States, supra.*

(1911); *Nebraska v. Iowa, supra,* 143 US at 368-370 (1892). In *Wood v. McAlpine, supra,* the court said:

> ". . . In view of the conditions shown however, the jury should have been given to understand that, *considering the character of the bank, and the characteristics of the stream,* including the testimony as to its habit of 'eating under,' and its effect, they must, to find avulsion determine from all the evidence that the destruction was sudden, rapid, visible, violent, of substantial amount, *and in a manner unusual along the Missouri river,* . . ." (emphasis supplied).

In accordance with this approach, violent and rapid changes in the Missouri, Mississippi, Rio Grande and Red Rivers have been treated as accretive and erosive rather than avulsive. This is because such changes are typical rather than unusual. *Wood v. McAlpine, Id,* at 1064; *Jefferis v. East Omaha Land Co., supra* 134 US at 190; *Nebraska v. Iowa, supra* 143 US at 369-370; *Denny v. Cotton,* 3 Tex Civ App 634, 22 SW 122 (1893); *Oklahoma v. Texas,* 260 US 606, 636-638 (1923). This element of the definition in effect could provide the policy basis for determining when a riparian owner should bear the loss of a change in the river because the change was usual and foreseeable, or the public should bear the loss of the change because the change was unusual and unforeseeable.

As formulated, the proposed definition is not only consistent with the federal cases, but it provides a basis for greater certainty in the law without the necessity of

complicated litigation. Avulsions must be limited to the rare and cataclysmic events that they are supposed to be. *See Pannell v. Earls,* 252 Ark 385, 483 SW2d 440, 442 (1972).

CONCLUSION

For the reasons stated the collective judgments of the Oregon Supreme Court and the Court of Appeals should be reversed and the State of Oregon awarded the ownership of Fischer Cut (parcels 2A, 2B and 2C and a portion of parcel 3).

Respectfully submitted

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel
Attorneys for Petitioner
State of Oregon

February, 1976

APPENDIX A

FLOOD PLAIN INFORMATION

WILLAMETTE RIVER
MARYS RIVER

CORVALLIS AND PHILOMATH
OREGON

PREPARED FOR
BENTON COUNTY, OREGON
BY
U. S. ARMY ENGINEER DISTRICT, PORTLAND
CORPS OF ENGINEERS, PORTLAND, OREGON
MARCH 1971

CONTENTS

(Omitted in printing)

TABLES

(Omitted in printing)

INTRODUCTION

This report describes the flood situation on Willamette River and Marys River in the vicinity of Corvallis and Philomath, Oregon. This information was requested by the Benton County Court, through the Oregon State Water Resources Board, to aid in the solution of local flood problems and the best utilization of lands subject to overflow. The report is based on rainfall and runoff records, past and future flood heights, and other technical data bearing upon the occurrence and size of floods in the study area.

This report covers two significant phases of the flood problem. First, it presents a record of the largest known floods of the past on Willamette and Marys River. Second, it discusses the probability and size of future floods.

Two sizes of future floods are considered particularly useful in planning for flood plain development. In this report, those floods are referred to as Intermediate Regional Floods and Standard Project Floods. Intermediate Regional Floods would occur on the average of once in 100 years. They are determined from an analysis of known floods on Willamette, Marys, and other rivers in the same geographical region having similar physical characteristics. A Standard Project Flood is one that would occur if the most severe combination of weather and run-off conditions that reasonably could be expected actually were to happen. It represents the reasonable upper limit of flooding. Both Intermediate Regional and

Standard Project Floods should be considered in planning for use of the flood plains.

The report contains flood plain maps, profiles, and cross sections which indicate the extent of flooding that has been experienced and that might occur in the study area. With that information the depth of probable flooding may be determined for any location in the study area.

The report does not include plans for the solution of flood problems. Rather, it is intended to provide a basis for further study and planning on the part of local governing bodies to minimize vulnerability to flood damages. This might involve local programs to control the type of use made of the flood plain through zoning and subdivision regulations, the construction of flood protection works, or a combination of the two approaches.

The Portland District of the Corps of Engineers will, upon request, provide technical assistance to Federal, State, and local agencies in the interpretation and use of the information contained herein and will provide other available flood data related thereto.

SUMMARY OF FLOOD SITUATION

The flooded area described in this report is located in the middle reach of Willamette River Basin and lies in Benton and Linn Counties. The principal urban developments in the study area are Corvallis and Philomath, with 1970 populations of 35,153 and 1,688, respectively. Willamette River is the principal stream in the area under study, with Marys River, Long Tom River, and Muddy Creek (Linn County) the major tributaries. This report describes the flood situation on: (1) Willamette River from the downstream end of Irish Bend at river mile 150.0 to the upstream end of Lower Kiger Island at river mile 125.0, and (2) Marys River from its mouth to Woods Creek at river mile 14.6.

Commercial, industrial, residential, and agricultural developments along Marys River have been flooded many times in the past and are within reach of the potentially larger floods of the future. The flood problem along Willamette River has been reduced by upstream storage projects. However, developments in the Willamette River flood plain are still within reach of the larger floods, similar in size to that of December 1964.

Streamflow records are the principal source of data used for this report. The U. S. Geological Survey has maintained stream-gaging stations on Willamette and Marys Rivers, and the National Weather Service has a stream gage on Willamette River at Corvallis. Residents along the streams have been interviewed and newspaper files and historical documents searched for information concerning past floods. From these investigations and

from studies of possible future floods on Willamette River and Marys River, knowledge of the local flood situation has been developed. The significant findings are summarized in the following paragraphs and are discussed in more detail in subsequent sections of this report.

* * *

THE GREATEST FLOOD known on Willamette River occurred in December 1861, before there was a stream-gaging network for recording flood heights. Based on high-water marks, it is estimated that Willamette River at Corvallis crested at 224 feet, m.s.l. The December 1964 flood was the greatest flood ever recorded on Marys River.

* * *

OTHER LARGE FLOODS on Willamette River occurred in 1890, 1901, 1909, 1923, 1943, 1945, 1948, 1953, 1955, and 1964. Flood control projects have been effective in preventing major catastrophies since 1940. Without upstream regulation the stage of the December 1964 flood would have been equal to that of the December 1861 flood.

* * *

INTERMEDIATE REGIONAL FLOODS which would occur on the average of once in 100 years were determined for Willamette and Marys Rivers. The magnitudes of those floods were obtained from analyses of flood records for those and other streams in the same general area. In future occurrences of an Intermediate Regional Flood on Willamette River, it will be possible

to control the stage in the study area to about 1 foot below the flood stage of December 1964, because flood control storage capacity has been added to the Willamette Basin reservoir system since 1964. The Intermediate Regional Flood on Marys River, where there is no upstream reservoir storage, would be slightly higher than the December 1964 flood.

* * *

STANDARD PROJECT FLOOD is defined as the largest flood that can be expected from the most severe combination of meteorological and hydrological conditions that could reasonably occur, excluding extremely rare combinations. A Standard Project Flood would be 5 to 7 feet higher than an Intermediate Regional Flood on Willamette River in the study area, and 2 to 6 feet higher on Marys River. Standard Project Floods should be considered in planning of any development in the flood plain.

* * *

FLOOD DAMAGES in the study area will be substantial even if floods no larger than past major floods were to occur. Even greater damages will be sustained should a Standard Project Flood occur, because of greater depths and higher velocities. Although flood heights along Willamette River have been reduced by upstream storage, construction of new developments within the flood plains increases the damage potential.

* * *

MAIN FLOOD SEASON for streams in Benton and Linn Counties begins in October and extends through April,

with the majority of the larger floods occurring in December and January. The larger floods are the result of widespread, heavy rains of 2 to 5 days' duration, augmented by snowmelt at a time when the soil is near saturation from prior rains. Frozen topsoil also will increase runoff and can contribute to the intensity of floods.

* * *

VELOCITIES OF WATER during major floods can reach 13 feet per second (about 9 miles per hour) in the main channel of Willamette River. Maximum velocities in the main channel of Marys River would be about 10 feet per second. Maximum velocities over the flood plain would be about 5 feet per second. Velocities greater than 3 feet per second, combined with depths of 3 feet or more, are considered hazardous.

* * *

DURATION OF FLOODS varies from 8 to 9 days on Willamette River and from 7 to 8 days on Marys River. Willamette River rises from its normal winter level to extreme flood peaks in 3 to 4 days, while Marys River reaches its peak in 2 to 3 days. During Intermediate Regional Floods, the average rate of rise on Willamette River is about 0.14 foot per hour, while Marys River rises at an average of 0.3 foot per hour.

* * *

HAZARDOUS CONDITIONS occur during large floods as a result of rapidly rising streams, high stream velocities, and deep flows.

FLOOD DAMAGE PREVENTION MEASURES. At present eight multiple-purpose storage projects in upper Willamette River Basin control the runoff from about one-half of the drainage area upstream from the study reach. One additional storage project is in the construction planning stage. Flood plain regulations are included in the comprehensive land use plan being prepared by Benton County. Several bank protection projects have been constructed and much debris has been removed from the channel of Willamette River in the study reach.

* * *

FUTURE FLOOD HEIGHTS that would be reached at selected locations if an Intermediate Regional or Standard Project Flood occurred are shown in table 1. Table 1 shows the comparison of those flood crests with the flood crests from the December 1964 flood.

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

— AND —

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

---

STATE OF OREGON'S SUPPLEMENTAL BRIEF

LEE JOHNSON
Attorney General
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioner

SUBJECT INDEX

	Page
Introduction	1
Corrective Statement of Facts	2
Conclusion	8
Appendix	9

In The Supreme Court Of The United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

—AND —

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

STATE OF OREGON'S SUPPLEMENTAL BRIEF

I
INTRODUCTION

Corporation has filed a reply brief in Case No. 75-577. This brief injects a wholly new and spurious issue as to the navigability of the Willamette River at the location of the property in dispute. The brief is

highly improper because it (1) purports to impeach corporate counsel's own stipulation as to navigability; (2) ignores undisputed evidence in the record on navigability; and (3) makes misleading and improper use of a 1976 letter of the United States Corps of Engineers. Since the spurious issue of navigability attempts to negate the Court's jurisdiction in Case No. 75-567 and the state's position as respondent in Case No. 75-577, the state requests leave of the Court to file this brief as either a supplemental brief of petitioner in Case No. 75-567, under Rule 41(5), or as a brief necessary to correct the misleading matter presented by petitioner in Case No. 75-577.

II

CORRECTIVE STATEMENT OF FACTS

Petitioner states as "facts" in its reply brief, in Case No. 75-577, that

> "The Willamette River above Corvallis, where the disputed property is located, *is not considered navigable in its ordinary condition* by the federal government. (App 2)" (No. 75-577 Reply Br at 2; Emphasis added).

And, at page 3, petitioner states:

> *"The disputed portion of the Willamette River is not 'navigable'* in the opinion of the Corps or under the definition requiring that the waters be suitable for commerce, trade and travel. It is properly designated a 'floatable' stream *the proprietary ownership of the bed being vested in the riparians."* Emphasis added).

At page 8, petitioner also states:

> "The Willamette River above Corvallis is not navigable. (App 2) [On trial Corvallis Sand and Gravel Company acknowledged this portion of the Willamette River to be navigable. This was on the basis of state law.]" (Bracketed material in original).

In support of these "facts" counsel cites in an appendix to his reply brief a letter from the Corps of Engineers, stating that "no dredging has ever been performed upsteam of Corvallis" and that "[t]he Flood Control Act of 28 June 1938 provides for improvement of the Willamette River including a channel 2 to 2½ feet deep from Corvallis to Eugene . . . [but d]evelopment of a navigation channel above Corvallis is not economically feasible." (No. 75-577 Reply Br. at 2, 8; App 5).[1]

The foregoing "facts" and argument of petitioner are misleading, wrong and improper for the following reasons:

1. Corporation's petition for certiorari in Case No. 75-577 stated two questions for review, both of which recognized the Willamette as "a navigable fresh water stream." (No. 75-577 Pet at 2, 3).

2. Corporate counsel himself had stipulated to the river's navigability in the trial below:

"MR. MIX: Okay. The state first asks that we

[1]The river distance from Corvallis to Eugene is approximately 53 miles.

References in petitioner's reply brief to "App. 2" in support of its navigation "facts" appear to be in error; Appendix 5 appears to be the relevant document.

stipulate to the fact that *Willamette River is navigable, we so stipulate.* The second thing the state asks us to stipulate is to certain aspects of the damages, we are unable to do this.

"MR. HERMAN: Okay." (Tr 16; Emphasis added).

3. In an excess of caution, the state placed in the record evidence of navigability of the river at the location in dispute. (Tr 65-67, 412-414). This evidence is overwhelming:

(a) Exhibit 114 consists of pages 906 and 907 of the Corps of Engineers report of 1871. (Tr 65-67, 412-414). This report shows that steamboats "[d]uring a high-water stage of the river, . . . run up as far as Eugene City, about eighty miles above Salem." (Jt App 119).

(b) Exhibit 115 includes the Corps of Engineers annual report of 1875 (Tr 65-67, 412-414); this report discusses the removal of snags below and above Corvallis by the United States snagboat. The report discusses the removal of snags at the mouth of the Booneville Slough, "four miles above Corvallis." (Ex 115 at 761-762; Jt App 139). Snags would not be cleared from a channel unless it was a channel used by steamboats and other commercial traffic which the report clearly indicates was the fact for areas above Corvallis. The report also described the City of Eugene as

> ". . . *usually considered the head of steam-navigation for light-draught boats during average stages of high water,* and only continuing for a few months of each year. Boats have ascended as high up as Springfield, some six miles above Eugene. . . ." (Jt App 148; Emphasis added).

(c) Exhibit 115 also includes page 1836 of the Corps of Engineers annual report of 1879 (Tr 65-67, 412-414); the report shows that the Corps of Engineers snag boat was moving up the West Channel of the Willamette River, "removing all obstructions as far up as Booneville, six miles above Corvallis, a shipping point of importance."[2]

(d) The Hyde field notes, pages 607 to 608 (also paginated 127 to 128) also mentioned the town of Booneville, and states that steamboats have been up to it in high water. (Ex 85; Tr 65-67, 412-414).[3]

(e) The report of K. M. MacDuffee, Assos., *Navigation Upper Willamette River, 1846-1936,* particularly pages 1, 4, 5, 14, 15 and 16, show extensive steamboat travel between Corvallis and Eugene prior to Oregon's admission into statehood and thereafter. (Ex 154; Tr 65-67, 412-414).[4]

4. The trial court found the river to be navigable as

---

[2]This particular page (1836) of Exhibit 115 was not included in the joint appendix because no issue had been raised as to the navigability of the Willamette River. We also call to the Court's attention that the transcript references are to page "1936" rather than "1836". The correct page is 1836 and is a part of Exhibit 115 which is before the Court.

[3]This exhibit is with the Oregon Supreme Court; as there was no issue of navigability, it was not included among the exhibits certified to this Court by the Oregon court.

[4]See note 3, *supra.*

to the section of the river which included the property in dispute:

> "The Willamette River was a navigable river at the time of Oregon admission into the Union in 1859, and is now navigable, in that section of the river *between its confluence with the Mary's River and upstream to the present site of the City of Corvallis Water Treatment Plant.*" (Jt App 176; Emphasis added).

5. Based on this conclusion, the trial court concluded:

> "The State of Oregon acquired title to all lands within its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. This acquisition of title by the State was by virtue of the State's sovereignty. Private ownership of the lands lying between the high and low water marks of the Willamette River, must therefore be by grant from the State of Oregon. These lands cannot be sold or otherwise disposed of by the State so as to prevent their use by the public of the navigable waters for navigation and fishing.
>
> "The ownership, if any, of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title." (Jt App 176-177).

6. The Oregon Court of Appeals also treated the river as navigable, stating in note 1 of its opinion

> "Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation." 18 Or App 524, 531, 526 P2d 569, 573 (Jt App 198).

Petitioner in its subsequent requests for review or rehearing never challenged this statement.

7. Finally, the letter in question is improperly before the Court because it is not part of the record. Moreover, it does not purport to state that the Willamette River above Corvallis was not navigable at the time of statehood for the purposes of bed ownership nor, for that matter, does it state that that section of the river is not navigable today. In any event, if the Court is to consider this correspondence it should also consider other 1976 correspondence between Mr. Mix, counsel for corporation, and the Corps of Engineers (this other correspondence is omitted from the appendix to petitioner's reply brief) which unequivocally shows that the Corps of Engineers has treated, and now treats, the Willamette River between Corvallis and Eugene as navigable waters of the United States. (See Appendix to this Supplemental Brief, *infra, particularly page 13).*

III
CONCLUSION

The State of Oregon submits that the record makes clear that the Willamette River is navigable under the federal test for title purposes and that the Court should disregard corporate petitioner's improper attempt to inject this spurious issue into the case at this time.

Respectfully submitted
LEE JOHNSON
Attorney General*
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
Attorneys for Respondent
September, 1976

APPENDIX
(Corps of Engineer Correspondence)

NPPND-WM-2 28 May 1976

Mr. Robert Mix
Attorney at Law
745 N.WE. Van Buren
Corvallis, OR 97330

Dear Mr. Mix:

Your letter of 13 May requested information on maintenance of a navigation channel in the Willamette River upstream of Corvallis. Our records show that no dredging has ever been performed upstream of Corvallis.

The Flood Control Act of 28 June 1938 provides for improvement of the Willamette River including a channel 2 to 2½ feet deep from Corvallis to Eugene. In 1904 the reach between Harrisburg and Eugene was determined unworthy of improvement and no work has been accomplished. Development of a navigation channel above Corvallis is not economically feasible.

If we can be of further help to you in this matter, please feel free to call on us.

Sincerely,

A. J. HEINEMAN
Chief, Navigation Division

ROBERT MIX
ATTORNEY AT LAW
CORVALLIS, OREGON 97330

745 N.W. Van Buren

May 13, 1976

Department of the Army
Portland District
Corps of Engineers
P. O. Box 2946
Portland, Oregon 97208

Dear Sir:

Would you please advise me as to whether or not work is performed routinely on the Willamette River upstream from Corvallis for the purpose of keeping the channel navigable.

It is my recollection I read in the newspaper several months ago that the Corps no longer was performing such work.

Thanks for your help.

Sincerely yours,

ROBERT MIX

RM:ms

NPPND-RF-1 28 January 1976

Robert Mix
745 N.W. Van Buren
Corvallis, OR 97330

Dear Mr. Mix:

In response to your written inquiry dated 26 January 1976. Although we do not conduct continuous channel maintenance, the Willamette River is considered navigable up to mile 183.2 in Eugene, Oregon.

The term "navigable waters of the United States" is administratively defined to mean waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce.

If we can be of further assistance, do not hesitate to call on us.

Sincerely,

F. R. BROCKSCHINK
Chief, Regulatory Functions
Branch

ROBERT MIX
ATTORNEY AT LAW
CORVALLIS, OREGON 97330

745 N.W. Van Buren

January 26, 1976

Corps of Army Engineers
2850 S.E. 82nd
Portland, Oregon 97266

Dear Sir:

This is to inquire as to whether or not the Willamette River above the VanBuren Street bridge in Corvallis is any longer considered "navigable". It is my understanding the Corps has ceased to conduct channel preservation activities, such as dredging, above Corvallis and that this portion of the stream in effect has been abandoned so far as navigation is concerned.

Thank you for your help in this matter.

Sincerely,

ROBERT MIX

RM:ms

Supreme Court, U. S.
FILED
APR 2 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

ANSWERING BRIEF OF RESPONDENT

ROBERT MIX
745 NW VanBuren
Corvallis, Oregon 97330
Counsel for Respondent

I hereby certif hat I served the foregoing Answering Brief for Respondent on Peter Herman, of attorneys for petitioner on the day of March, 1976, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

Robert Mix
Attorney for Respondent

TABLE OF CONTENTS

Page

Statement of Facts 1

Summary of Argument

1. The State of Oregon does not own the beds of any navigable fresh water streams and therefore does not own Fischer Cut . . . 4

2. Review of the formation of Fischer Cut is not before this court because the trial court found, and the Oregon appellate courts affirmed, as a question of fact, that an avulsive change of channel had taken place. 5

3. The change of channel through Fischer Cut was avulsive as a matter of law. 5

4. The ownership of the former loop channel around Fischer Cut is not before the court. 6

5. To grant title to Fischer Cut to the State of Oregon would be to take property of Corvallis Sand and Gravel Company in violation of due process. 6

6. The profit motive is not a valid reason for granting ownership to the bed underlying Fischer Cut to the State of Oregon. 7

Proposition I

The state does not own the beds of any navigable fresh water streams and therefore does not own Fischer Cut. 8

Page

Argument 8

Proposition II
The finding by the trial court, affirmed by the Oregon Court of Appeals and the Supreme Court of Oregon, that an avulsive change of channel had taken place in Fischer Cut, is not reviewable 8

Argument 8

Proposition III
The 1909 change of channel of the Willamette river through Fischer Cut was avulsive and did not result in any change of ownership of the bed underlying the new channel 10

Argument 10

Proposition IV
The title to the abandoned bed is not in issue in this case 17

Argument 17

Proposition V
To grant title to the state to the land underlying Fischer Cut would be a taking of private property without compensation and in violation of due process. 18

Argument 18

Page

Proposition VI
There is no adequate reason for granting title to State to the bed underlying Fischer Cut. 22

Argument 22

Conclusion 26

INDEX OF AUTHORITIES

Cases Cited

Anderson-Tully v. Franklin, D.C. (N.D. Miss.) (1960) 307 Fed.Supp. 539 . . . . . 5, ...13, 15, 16, 27

Arkansas v. Tennessee, 246 U.S. 158, 62 L.Ed. 638 (1918) 20

Bohn v. Albertson, 238 P2d 128 (Cal. 1952) . . 17

Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 . . . . . 6, ...18, 19, 20

Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920). 14

Durfee v. Keiffer (Neb.) 95 NW2d 618 (1959). . 15

General Talking Pictures Corp. v. Western Electric Co., 309 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 10

INDEX OF AUTHORITIES (Cont.)

Page

Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140 10

Hughes v. Washington, 389 U.S. 290, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967) 19

Martin v. Waddell, 41 U.S. 367 (16 Pet. 1842). . 21

Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372 (1904). 11

National Labor Relations Bd. v. Waterman S.S. Corp., 309 U.S. 206, 84 L.Ed. 1036, 60 S.Ct. 493. 10

Nebraska v. Iowa, 143 U.S. 359, 36 L.Ed. 190 . . 16

People v. Johnson, 166 NYS2d 732 17

People v. Kracmer, 164 NYS2d 423 17

Port of St. Helens v. Oregon, Civil No. 74-572 (D. Or. August 28, 1975, modified October 2, 1975). 8, 26

Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 68 L.Ed. 413, 44 S.Ct. 164. 10

State et al v. R. E. Janes Gravel Co., Inc. 174 SW2d 739 (Tex. 1943) 20

United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 10

INDEX OF AUTHORITIES (Cont.)

Page

Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119 (1908) 14, 16

Wyckoff et al v. Mayfield, 130 Or 687, 280 Pac 340. 11

Statutory and Constitutional Provisions

Constitution of Oregon, Article I, Sec. 18 . . . 19

Constitution of Oregon, Article VII, Sec. 3. . . 9

Constitution of United States, Amendment V . . . 18

Constitution of United States, Amendment XIV, Section 1. 18

Oregon Revised Statutes 390.310 through 390.368. 23

Oregon Revised Statutes 390.332(1) 24

Oregon Revised Statutes 390.334(1) 24

Oregon Revised Statutes 390.338(1) 24

Treatises and Other Authorities

32 Am.Jur.2d 679, Federal Practice and Procedure, Sec. 227. 9

35 Am.Jur.2d 645, Fish and Game, Sec. 1. 22

INDEX OF AUTHORITIES (Cont.)

Page

78 Am.Jur.2d 851, Waters, Sec. 406 12

78 Am.Jur.2d 852, Waters, Sec. 406 11

65 CJS 271, Navigable Waters, Sec. 86. 14

65 CJS 275, Navigable Waters, Sec. 87b 17

3 Farnham, Waters and Water Rights, Sec. 847, 2492 15

Gould, Law of Waters, 3d Ed., Sec. 159 15

Thompson, Real Property (1957 Replacement) Volume 5A, page 612, Sec. 25.61. 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

---

ANSWERING BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent Corvallis Sand and Gravel Company (Corvallis Sand) is the record owner of the land underlying Fischer Cut, the property in its entirety having originally been patented out by the United States. (Exs. 263, 264, 265) Petitioner State of

Oregon (State) acknowledges that the land underlying the cut was in private ownership. (Brief for Petitioner, p. 7)[1] The Fischers deeded the property to Corvallis Sand. (Ex. 263)

The trial court made the following findings of fact relative to Fischer Cut:[2]

> "3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> "5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

---

(1)"Fischer Island and Fischer Cut were owned by the Fischer Family."

(2)While the action was one at law, the parties stipulated that it should be tried to the court sitting without a jury. The trial judge, as the trier of facts, made the quoted findings.

> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.
>
> "8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."
>
> Appendix, 180-181

Both the Oregon Court of Appeals and Oregon Supreme Court concurred in the findings.

These findings were based on at least the following evidence:

1. The testimony of retired Circuit Court Judge Fred McHenry who had observed the change of channel shortly after its occurrence and stated that the change was a subject of common community discussion. (App. 171.) [This testimony was inadvertently omitted from the Appendix.]

2. The testimony of Douglas Hastie who lived in the community at the time and who stated that the flood of 1909 occurred around Thanksgiving day and was extremely high and who was told that the river broke through Fischer Cut in 1909 and made a new channel. (App. 63-65)

3. Exhibit 62, the 1890 map prepared by J. M.

Clapp, which showed the main channel flowing around Fischer Island in a loop with a high water chute in the approximate location which became Fischer Cut in 1909. (App. 40) As shown by the profile at the bottom of exhibit 62 water flowed though this chute only when it reached a level five feet above normal high water. (Fred Fischer, the state's witness, testified that water flowed in the "gully" (Fischer Cut) only "During the winter rainy season". (App. 47))

4. Exhibit 110-A, the Corps report of January 10, 1906, which identified the chute as the "high water 'cut off' channel". (App. 103)

5. The U. S. Geological survey map of 1911-1913 (Ex. 257) which is the first survey made after the 1909 change of channel and which shows the main river to be in the Fischer Cut area with the former main loop channel narrowed to the point (compared with Ex. 62) where only a small amount of water could flow through it. (App. 41)

6. The testimony of Corvallis Sand's river hydraulics expert Peter Klingeman, "an avulsive change of channel took place..." (Tr. 1091)

SUMMARY OF ARGUMENT

1.

The State of Oregon does not own the beds of any navigable fresh water streams and therefore does not own Fischer Cut. (Based on the brief of petitioner in case no. 57-577 incorporated by reference.)

2.

The trial court found that an avulsive change of channel had taken place in 1909 which resulted in the new channel flowing through Fischer Cut. The Oregon Court of Appeals and the Supreme Court of the State of Oregon both concurred in the finding. The Constitution of the State of Oregon prohibits an appellate court from re-examining any fact found by a trial court unless the reviewing court "...can affirmatively say there is no evidence to support the verdict."

This court does not grant certiorari to review questions of evidence.

Based on the foregoing, the question of whether or not the change was avulsive is not reviewable by this court.

3.

There are numerous definitions of avulsion, the most practical one being "...when the change [of channel] is not by accretion, it is by avulsion." Anderson-Tully v. Franklin, D.C. (N.D. Miss.) (1960), 307 Fed. Supp. 539, 540. After the flood of 1909 almost all the water of the Willamette river flowed through Fischer Cut. The change of channel took place during the flood and was not an "erosion" (a gradual eating away of the bank) as contended by State but was a major change of channel. The land underlying the bed was in private ownership, the original patent having been issued by the United States. As such, the land is not "riparian" and the issue should not be considered as a dispute between a riparian

owner and the state.

Since the Romans, the law has been that an avulsive change of channel makes no change in ownership of the underlying bed. Except for one Texas case based on a statute of doubtful constitutionality, there is no authority for the giving of title to private land to the state.

The fact that water flowed through the Fischer Cut area prior to 1909 during high water stages of the river is irrelevant.

The doctrine of submergence should be applied under which there is no loss of title to the land underlying the new channel. The land is, however, subject to the public navigational servitude. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L. Ed.2d 526, 542, 94 S.Ct. 517.

4.

No evidence was introduced at the trial as to the condition, use or ownership of the former loop channel around Fischer Island. The ownership of that channel is not properly before this court.

If it is before the court, the channel, being dry, is no longer needed for public navigation and would belong to the riparian owners on either bank of the abandoned channel. Bonelli, supra, 38 L.Ed. at 539, 541, 544.

5.

To grant title to the State of Oregon of the

land underlying Fischer Cut would be a taking of private property without compensation and in violation of due process.

Since the Romans, the law has been that an avulsive change of channel does not work any change in ownership of the underlying bed. This is universal common law both in England and the United States. To grant title to the state would be a violation of due process.

6.

There is no reason why title to the land underlying the Fischer Cut channel should be granted to the State of Oregon. The law is settled that the state has control of the fishery in the area and that the public has the right to use the water for purposes of navigation and recreational uses and to transport logs. The implementation of the Oregon "Greenway" act, relied upon by State, which act provides for the preservation of the beauty of the river and of historic sites, is not a valid reason for granting title to State as the act contemplates the acquisition of private property by condemnation and does not contemplate taking river bottom land, particularly land which is not riparian.

The claim that the land is needed so that State can make a profit from sale of minerals, sand and gravel, gas and sulphur, kelp and seaweed does not justify transferring the title to State which would deprive the private landowner of his proper profits available from the soil. Also, the profit motive is not a sufficient reason for granting title to State. Port of St. Helens v. Oregon, Civil No. 74-572 (D.

Or. August 28, 1975, modified October 2, 1975).

State's claim that it should be granted title to the bed so that it could sell and lease the land demonstrates the hypocrisy of State in its claim that it needs the land to protect public interests. It is wholly inconsistent to claim the land is required for the protection of the public while at the same time contending it must be acquired in order to be sold or leased.

PROPOSITION I

THE STATE DOES NOT OWN THE BEDS OF ANY NAVIGABLE FRESH WATER STREAMS AND THEREFORE DOES NOT OWN FISCHER CUT.

ARGUMENT

The Brief of Petitioner (Corvallis Sand and Gravel Company) in case no. 57-577 is incorporated by reference.

PROPOSITION II

THE FINDING BY THE TRIAL COURT, AFFIRMED BY THE OREGON COURT OF APPEALS AND THE SUPREME COURT OF OREGON, THAT AN AVULSIVE CHANGE OF CHANNEL HAD TAKEN PLACE IN FISCHER CUT, IS NOT REVIEWABLE.

ARGUMENT

The trial court found that the change of channel

into Fischer Cut:

> "...was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion." (App. 181)

This finding was based on the evidence summarized in Statement of Facts, supra p. 5, which evidence was substantial.

The Oregon Court of Appeals and the Supreme Court of the State of Oregon affirmed the finding.

The Constitution of Oregon prohibits the re-examination of any fact found by a trial court unless the reviewing court, "...can affirmatively say there is no evidence to support the verdict." (3)

This court does not grant certiorari to review the evidence or inferences drawn from it in the trial court and would not ordinarily grant certiorari to review decisions or judgments based solely on questions of fact. 32 AmJur 2d 679, Federal Practice and

---

(3) "Jury trial; re-examination of issues by appellate court; record on appeal to Supreme Court; affirmance notwithstanding error; determination of case by Supreme Court. In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Constitution of Oregon, Article VII, Section 3.

Procedure, Sec. 227 citing General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 82 L.Ed. 1273, 58 S.Ct. 849; National Labor Relations Bd. v. Waterman S. S. Corp., 309 U.S. 206, 84 L.Ed. 704, 60 S.Ct. 493, reh den 309 U.S. 696, 84 L.Ed. 1036, 60 S.Ct. 611; United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 68 L. Ed. 413, 44 S.Ct. 164; and Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140.

In view of the finding of the trial court there is nothing for this court to review.

PROPOSITION III

THE 1909 CHANGE OF CHANNEL OF THE WILLAMETTE RIVER THROUGH FISCHER CUT WAS AVULSIVE AND DID NOT RESULT IN ANY CHANGE OF OWNERSHIP OF THE BED UNDERLYING THE NEW CHANNEL.

ARGUMENT

State urges that despite the finding, the change was not avulsive as a matter of law because the river did not flow exclusively in the new channel immediately after the 1909 flood. Exhibit 257, Appendix 41, shows that by the time of the USGS survey of 1911-13 almost all of the river flowed in the new channel. State further contends that the change is not avulsive because there was water flowing in the new channel commencing in about 1890 when the river was four to five feet above normal water. State did not include in its facts the testimony of Fred Fischer,

its witness, that water flowed in the "gully" (the new channel) only "during the rainy season". (App. 47) Nor did State point out that the 1890 Corps survey by Clapp described the new channel as a "hi-water chute" in which water flowed only when the level reached five feet above normal. (Ex. 62, App. 40) The "gully" became the new channel of the river in 1909 during a major flood.

The principal that an avulsive change of channel works no change in the ownership of the underlying fee is as ancient as the Roman Law. See historical discussion Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372 (1904). This is also the law of Oregon. Wyckoff et al v. Mayfield, 130 Or 687, 691-692, 280 Pac 340 (1929).

The land underlying the new channel is not riparian land but was dry soil owned and occupied and on which taxes were being paid by the owner immediately prior to the inundation. As such, it is not subject to any of the law applicable to riparian property.

State contends, despite the magnitude and violence of the change of channel which occurred in 1909, that this change is an "erosion". "Erosion" means "the gradual washing away of land bordering on the stream or body of water by the action of the water." 78 AmJur2d 852, Waters, Sec. 406. The land that was washed away did not border on the main channel of the Willamette river, nor was the washing away of the land gradual.

To prove erosion, State relies on the finding

of the trial court:

> "It was estimated then [January of 1906] that roughly one-quarter of the flow of the river was carried through Fischer Cut."

January is the middle of the rainy and high water season in Oregon. It is only natural that at that time of year the high water chute would be carrying part of the flow of the river. This does not support the erosion theory.

State contends that unless the total change of channel is instantaneous there is no avulsion.

There are only three recognized forms of movement of a river:

1. Erosion. (Defined and discussed, supra, p. 11.)

2. Accretion. Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. 78 AmJur2d 851, Waters, Sec. 406. State does not contend that an accretion occurred.

3. Avulsion. Avulsion has numerous definitions:

a) The sudden and perceptible gain or loss of riparian land.

b) The sudden washing from one of its banks of a considerable body of land and the depositing of it

on the opposite bank.

c) The sudden abandonment of an old channel and the formation of a new one.

Thompson, Real Property (1957 Replacement), Volume 5A, page 612, Sec. 25.61.

Avulsion has also been defined "...so far as concerns practical purposes, when the change is not by accretion, it is by avulsion." Anderson-Tully, supra at 540, 541.

Another definition would be where there is a change of channel which leaves an intervening strip of land undisturbed by the change of channel irrespective of the length of time required for the change to occur.

The latter definition has been approved:

"However, when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, title to riparian lands, which may have become islands, remains unaffected, notwithstanding the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of the waters passing through the old channel

until finally the new channel became the main channel of navigation."

65 CJS 271, Navigable Waters, Sec. 86

Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920) represents a leading authority. Although the change from the old to the new channel there extended over approximately 50 years, the Eighth Circuit applied the principle that the change was avulsive.

Commissioners, supra, cited Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119 (1908), a proceeding in which the State of Washington brought a suit in equity to settle the boundary dispute between the states in the area of the mouth of the Columbia river. Historically, the two channels, the north channel and the south channel, existed at this location. Upon admission of Oregon to the Union, the north channel was designated as its north boundary. When Washington was admitted, the same channel was designated as its south boundary. Over a period of many years the north channel filled in and the south channel became the channel of navigation. Washington contended that this change brought about a change of boundary enlarging the area of that state. The Supreme Court rejected the contention, 53 L.Ed. at 136:

"These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river,

the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river."

Also approving the rule are Durfee v. Keiffer, (Neb.) 95 NW2d 618 (1959) and Anderson-Tully, supra.

Farnham also supports such a definition:

"So, no change of boundary is worked by a change of its channel by a river forming the boundary between two tracts of land, by the gradual cutting of a new channel during freshets, extending over several years, where during such period nearly all the water returns to the old channel after freshets until such new channel is cut through, when the old channel is abandoned and nearly all the water flows through the new one, as such a change is an avulsion rather than an accretion."

3 Farnham, Waters and Water Rights, Sec. 847, 2492

Gould, Law of Waters, 3d Ed., Sec. 159 states:

"But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates."

In Nebraska v. Iowa, 143 U.S. 359, 36 L.Ed. 190, it was held that where the Missouri river, which had flowed in an oxbow, cut across the neck of the peninsula there was no change in boundary and Nebraska did not acquire title to any portion of the new bed or of the land intervening between the oxbow and the new channel, the boundary between the states continuing in the middle of the abandoned channel. While this is a boundary case, as was Washington v. Oregon, supra, it supports the proposition that what was formerly privately owned dry land continues in private ownership.

State contends the formation of the new channel must be "sudden" and that if it is nct then it is "erosion". Anderson-Tully, supra, refutes this by declaring that what is not an accretion is an avulsion.

Another approach to the problem is to apply the law of submergence. When privately owned land is submerged, not by the process of erosion in the classic sense (i.e. where water erodes away the bank), the land continues in private ownership subject to the public servitude of navigation and fishery.

> "Privately owned land does not lose its character as such by the inflow of navigable waters, except to the extent that private rights must yield to the dominant public right of navigation therein, together with incidents necessary to the

> enjoyment of the right."
>
> 65 CJS 275, Navigable Waters, Sec. 87b citing Bohn v. Albertson, 238 P2d 128, (Cal. 1952) (at pages 140-41), People v. Johnson, 166 NYS2d 732, and People v. Kracmer, 164 NYS2d 423.

By whatever name the change of channel into Fischer Cut is called, it does not work a change of ownership to State of the private land constituting the new bed.

PROPOSITION IV

THE TITLE TO THE ABANDONED BED IS NOT IN ISSUE IN THIS CASE.

ARGUMENT

In its "Questions Presented" State asks,

> "...does federal law deprive the public of title to the beds of both channels?"

No reliable evidence was offered in the case as to the present condition and use of the abandoned channel of the Willamette which before 1909 flowed around Fischer Island. (Ex. 62) (App. 40) The title to that channel was not in dispute between the parties as Corvallis Sand made no claim to it.

Not being an issue in this case, and complete

evidence not having been presented to the trial court, the ownership of the abandoned bed is not properly before this court.

If it is considered to be before this court, the channel is no longer needed for public navigation and would revert to the riparian owners on either bank of the abandoned channel. Bonelli, supra, 38 L.Ed. at 539, 540, 541.

PROPOSITION V

TO GRANT TITLE TO THE STATE TO THE LAND UNDERLYING FISCHER CUT WOULD BE A TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS.

ARGUMENT

Both the Constitution of the United States and the Constitution of Oregon prohibit the taking of property without just compensation as a violation of due process.(4)

---

(4)Constitution of United States, Amendment XIV, Section 1:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

Constitution of United States, Amendment V:
"No person shall ... be deprived of life, liberty, or property, without due process of law;"

The bed of Fischer Cut was originally patented out by the United States and was in private ownership in 1909 and still is of record in private ownership. (Exs. 263, 264 and 265 being the original patent and chain of title to Corvallis Sand.)

A judicial declaration that the title passed to State when the land was inundated in 1909 would be a taking of that property in violation of due process.

State's brief is silent on the issue of due process.(5) The authority on the subject is limited. Bonelli, supra, 38 L.Ed. at 541, quoted (from the concurring opinion of Mr. Justice Stewart) Hughes v. Washington, 389 U.S. 290, 298, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967) as follows:

"Although the state made no attempt to take accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private property into public property without paying for the privilege of doing so. The due process clause of the 14th Amendment forbids such confiscation by the state no less through its courts than

---

Constitution of Oregon, Article I, Section 18:
"Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any men be demanded, without just compensation; ..."

(5)The briefs of the State of Washington and the State of California joined by 22 other states are also silent on the issue of due process.

through its legislature, and no less when a taking is unintended than when it is deliberate."

Here, the taking would be even more flagrant. The land forming the bed in Fischer Cut is not riparian land but is fee simple land of record in private ownership. The laws of accretion and erosion do not apply to avulsive channels, Arkansas v. Tennessee, 246 U.S. 158, 62 L.Ed. 638 (1918) because the bed remains in private ownership with no change of boundary. Also, if the river were to abandon Fischer Cut the title would clearly be in the record holder of title on the basis of re-emergence of submerged land. Bonelli, supra, 38 L.Ed. at 541.

State relies on State et al v. R. E. Janes Gravel Co., Inc., 174 SW2d 739 (Tex. 1943) for the proposition that when a change of channel takes place avulsively the state acquires title to the land underlying the new channel. This appears to be the only case that has ever so held. In the decision the court states that both parties "conceded" that it is the rule that the law of Texas is in accordance with the decision. (Page 741) The decision is silent as to due process and there is no explanation given as to how title automatically vests in the state because navigable water now flows over what had been private land. The decision is based on a gross misconception of the law of property pertaining to the public right of navigation and fishery and of the law of due process. In Janes the court held that because the river now flowed into what had formerly been a gravel pit the owner of the pit must pay the state royalty for gravel materials removed from the pit area. The source of the state's authority

was a statute which presumably grew out of the misconception that where navigable fresh water rivers are concerned there are no limitations on the authority of the state to deprive private owners of their rights. The decision is clearly in violation of due process and is not reliable precedent.

Even though Janes is accepted as precedent it would not apply to Fischer Cut because Oregon has no such statute.

State also relies on such cases as Martin v. Waddell, 41 U.S. 367 (16 Pet. 1842) for the proposition that the state owns the beds of all navigable streams. Martin and the other cases relied upon involved disputes between either a governmental unit and the riparian or adjacent riparians. The cases all involved either tide water or the beds of navigable fresh water streams which had not changed other than by the gradual processes of accretion or erosion. As such, they are not authority for the claim that title automatically vests in the state when the waters of a river encroach by other than erosion upon privately owned land.

A declaration that title to this land has passed to State would be in violation of due process.

PROPOSITION VI

THERE IS NO ADEQUATE REASON FOR GRANTING TITLE

TO STATE TO THE BED UNDERLYING FISCHER CUT.

ARGUMENT

State contends that it requires ownership of the bed underlying Fischer Cut for the following reasons:

1. To protect fishery.

2. To protect navigation.

3. To protect the public recreational use of the river.

4. To establish a scenic waterway under the Oregon "Greenway" Act.

5. To derive a profit from:

a. Sale of oil, gas and sulphur.

b. Transportation and storage of logs.

c. Sale of kelp and seaweed.

d. Sale of minerals.

e. Sale of sand and gravel.

f. Sale and lease of the bed of the river.

1. Fishery. The state has the authority to protect the publish fishery irrespective of the ownership of the underlying bed. 35 AmJur2d 645, Fish and Game, Sec. 1. There is no evidence in the case to establish any need for State to own the new bed to protect the

public fishery.

2. Navigation. The Federal government, under the commerce clause, has taken over the major burden of protecting navigation. The agency chiefly responsible for protecting navigation is the Corps of Engineers. State's residuary control over navigation is minimal. The Corps granted permits to Corvallis Sand to remove materials from the Fischer Cut area. (Ex. 280-307) The granting of the permits establishes conclusively there was no interference with navigation. There is no evidence in the case to show that State's responsibility to protect navigation has in any way been hindered by the fee being vested in Corvallis Sand.

3. Recreation. There is no evidence in the case establishing that the public rights of recreational use of the Fischer Cut area of the Willamette river, or of any other section of the river the underlying bed of which is in private ownership, has in any way been interfered with or diminished because of private ownership of the bed.

4. To establish a "greenway". The legislative authority for the establishing of a Willamette river greenway is covered by ORS (Oregon Revised Statutes) 390.310 through 390.368. The purposes of the greenway plan are, as set forth in State's brief, to establish scenic recreational areas, parks, to preserve historical sites and structures and to preserve mineral deposits. The law provides only as to mineral aggregate deposits that the "plan shall include the location" [of such deposits]. The act specifically provides for the acquisition of necessary easements

through purchase, gifts, or by way of condemnation.(6)

Clearly, the greenway law contemplates that private property shall not be taken except in accordance with due process. There is no provision in the act indicating the intention of the legislature to deprive any owner of his private property rights. Nor do the statutes contemplate use of the bed of the river. State has not fairly construed the intention and meaning of the statutes.

5. To receive royalties for oil, gas and sulphur. There is no evidence in the case that any of these deposits are contained in the Fischer Cut area.

6. Transportation and storage of logs. There is nothing in the evidence to indicate there has been any use of Fischer Cut for the transportation and storage of logs. Private ownership of the bed would not in any way inhibit the floating of logs in the river so long as there was no interference with other navigation.

---

(6)"The department may acquire such easements by any method, including but not limited to the exercise of the power of eminent domain." ORS 390.332(1). "..each such easement may be acquired by any means including but not limited to the exercise of the power of eminent domain." ORS 390.334(1). "...the Department of Transportation may only exercise the power of eminent domain in the acquisition of lands or interests therein that are situated within the boundaries of the Willamette River greenway for state parks or recreation areas in the parcels of land described in Section ..." ORS 390.338(1).

7. Gathering kelp and seaweed. There is no evidence there is any kelp and seaweed in this area of the Willamette river.

8. Minerals. There is no evidence there are any minerals in Fischer Cut or in the Willamette river generally.

9. Sand and gravel. Sand and gravel materials obviously do not collect in the area of the river as they were removed by Corvallis Sand and Gravel Company. State seeks to require Corvallis Sand to pay for materials Corvallis Sand owns.

10. Sale and lease of the bed of the river. It is ironic State contends it must own the bed of the river to protect such public rights as navigation and fishery while at the same time acknowledging that it wants the land under Fischer Cut so that it can sell or lease it. If it in fact needs title to protect the public it cannot at the same time claim it needs title in order to dispose of the property.

There is an admitted hypocrisy in State's position. If it in fact believes that it must own the beds of rivers to protect public rights, then it should acknowledge that it should not dispose of the bed or of any minerals, sand or gravel contained therein. The contention that State needs the bed for the protection of the public obviates any argument it also needs it for the purpose of disposing of it. The admission it wishes the land so it can dispose of it also nullifies State's contention that private ownership interferes with legitimate public use.

The claim it needs the property to make a profit for the public treasury is not a proper one under law. (Port of St. Helens v. Oregon, Civil No. 74-572 (D. Or. August 28, 1975, modified October 2, 1975) set forth as an Addendum to brief of petitioner Corvallis Sand and Gravel Company at page 47 and incorporated herein by reference.) As pointed out in St. Helens:

> "...nor did it [State] introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in The State."

By its position State would make the private owner a trespasser if he sought, during low water stages of the river, to pass from his land to the river.

State has failed to demonstrate any legitimate need for ownership of the bed of Fischer Cut or of the bed of the Willamette generally or of any other navigable fresh water river.

CONCLUSION

The historic definitions of avulsion are unsatisfactory. The single term "avulsion" has been used to identify:

1. A situation where a large chunk of land is broken off and subsequently deposited downstream;

2. Where there has been a boundary dispute over the ownership of the abandoned bed of a river;

3. The situation where a river suddenly changes course flowing over what formerly had been dry land;

4. The situation here presented where the river from time to time made inroads over what had formerly been dry land but did not make a major shift into the new channel until after the lapse of several years.

Because unsatisfactory definitions often create theoretical rather than real problems, the traditional definitions of avulsion should be abandoned and the term should be given a practical definition "when the change is not by accretion, it is by avulsion." Anderson-Tully, supra, at 540, 541. (It would also be helpful to use some other term to identify the situation where a large chunk of land breaks away from a bank and is deposited elsewhere such as "avulsive erosion".) Accretion is identifiable because it is a normal wearing away of the bank of the river. Any change other than the normal wearing away would be identifiable as avulsion or avulsive erosion and the law would be settled.

State seeks an automatic transfer of title of the bed underlying Fischer Cut from private ownership because the land is now under water. Except for one Texas decision, the validity of which is doubtful, all legal precedent dating from the Romans is to the contrary. The precedent is based on wisdom: there is no valid reason for taking a man's land because it is now inundated. To the contrary, the private owner has already suffered substantial loss because of the presence of the river. State would complete

that loss by depriving the owner of his land.

State ignores the fact the land is not riparian but is land which was formerly tillable but which through an act of God has been immersed. Ignoring the non-riparian nature of the land, State seeks to invoke such principles as "equal footing". It contends that because of the equal footing doctrine it should be declared the owner of Fischer Cut. Equal footing means nothing more than that states admitted to the Union subsequent to the original 13 states are to be treated equally with them before the law, the new states to be neither inferior nor superior to the original states. It was universal common law at the time of the admission of the original states that an avulsive change of channel worked no change of ownership of land underlying the new channel. State seeks to be treated more favorably than the original 13 states by rewriting the law of avulsion to its advantage. Proper application of the equal footing doctrine would deny State any claim of ownership of Fischer Cut.

Corvallis Sand categorically denies that State has any genuine need for title to the bed underlying Fischer Cut. If, for the purposes of argument, it is admitted that State does have a "need" for the title, as a matter of due process the law does not take private property without compensation because some one else "needs" the land. Such a proposition is repugnant to our whole concept of justice. Further, because the law of avulsion has prohibited the taking of submerged land, it is a denial of due process to attempt, at this late date, to rewrite that law.

The indifference of all the states involved in this case to due process is surprising if not shocking. Sovereignty is not an unbridled power. The law did not start with the formation of the states. The concepts of continued ownership of submerged land had already endured for many centuries. Under the guise of "sovereignty" the states would now rewrite that law.

If there is doubt as to the applicability of the law of avulsion to this particular situation, even though the evidence is overwhelming that the significant change of channel was avulsive, then the law of submergence should be applied under which the private landowner retains his title subject to the public navigational and recreational servitude.

Whether the change is treated as an avulsion or as a submergence, the end result is the same in that the owner retains his title and the proper public rights are protected.

Respectfully submitted,

ROBERT MIX
745 N.W. VanBuren
Corvallis, Oregon 97330
Counsel for Respondent

March, 1976

I hereby certify that I served the foregoing Answering Brief for Respondent on Peter Herman, of attorneys for petitioner on the day of March, 1976, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

Robert Mix
Attorney for Respondent

Supreme Court, U. S.
FILED
MAY 3 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

PETITIONER'S REPLY BRIEF

LEE JOHNSON
Attorney General
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4758
Counsel for Petitioner

TABLE OF CONTENTS

Page

I. The River Flowed Through Fischer Cut at Intermediate as Well as at Higher Stages of the River 1

II. The Factual Inference or Legal Conclusion of the Oregon Courts that an Avulsion Occurred at Fischer Cut is not Binding upon the United State Supreme Court in this Case 4

Appendix 9

INDEX OF AUTHORITIES

Cases

First National Bank of Hartford v. City of Hartford, 273 U.S. 548, 552-553 (1927) 5

Great Northern Railroad Co. v. State of Washington, 300 U.S. 154, 165-166 (1937) 5

Southern Pacific Co. v. Arizona, 325 U.S. 761, 771 (1945) 5

Whitus v. State of Georgia, 385 U.S. 545, 550 (1967) 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

PETITIONER'S REPLY BRIEF

I.

THE RIVER FLOWED THROUGH FISCHER CUT AT INTERMEDIATE AS WELL AS AT HIGHER STAGES OF THE RIVER

Defendant corporation incorrectly states the Facts Concerning Fischer Cut. At page 4 of respondent's answering brief, it states:

"As shown by the profile at the bottom of Exhibit

62 water flowed through this Chute *only when it reached a level of five feet above normal high water.*"

Defendant's interpretation that water flowed in the overflow channel only when the river was five feet above normal *high* water is not supported by the record.

The uncontradicted testimony was to the contrary in that the flowing of water at the five foot stage meant 5 feet above *the lowest stage of the river.* Thus at page 225 of the Transcript the following appears:

"Q: Well, to simplify that a little bit, Mr. McReary, would water flow in that chute?

"A: Yes, it would flow in that chute any time that *the water stage of the river above the lowest stage observed at that time,* whenever that stage reached, according to the scale here, reached five feet above extreme — *above the lowest stage of the river,* water would enter that chute and course downriver. It would be — it might be stopped a few feet downriver and have to rise a foot higher than that in order to get over the point that's indicated in the channel downstream from its entrance at 'B.'

"Q: Is five feet above extreme low water a high water stage or intermediate stage?

"A: *It is an intermediate stage, a typical summer-spring-fall stage,* when it drops below five feet, that would be getting closer toward the lowest water. This map, the legend indicates it's drawn with all the information being based on the lowest water and it contains soundings in the channel so that the depth

of the channel is known at lowest water." (emphasis supplied)

The court itself found that "[t]he Fischer Cut Channel was dry at low water, or below the five foot stage, and carried water only at "*intermediate* or high stages of the river." (emphasis supplied) (A 181). Even this state of facts had changed by January of 1906. The court found that one-fourth the river was flowing through Fischer Cut (A-181). This flow was at only the four foot stage (Ex 110A, p. 2; A-103-104).

Nor, as defendant incorrectly contends, was the flow through Fischer Cut confined only to the winter months. Water flowed in the cut also in the spring and fall. During spring, the whole island (Fischer Island) was sometimes covered with extreme high water (Tr 394, A-48). For example, in April of 1907, at the Albany Guage, the river was frequently above the four foot stage as Exhibit 71, page 162 attests (A-76). Similarly, Exhibit 71, page 73 shows that in November of 1906 the Albany Guage was frequently and substantially above the four foot stage (Appendix to this brief p. 10).*

---

* This page of Exhibit 71 is part of the admitted evidence but was not included in the joint Appendix of the parties and, therefore, is included as an appendix to this brief.

II.

THE FACTUAL INFERENCE OR LEGAL CONCLUSION OF THE OREGON COURTS THAT AN AVULSION OCCURRED AT FISCHER CUT IS NOT BINDING UPON THE UNITED STATES SUPREME COURT IN THIS CASE.

Defendant argues (Resp Ans Br, p. 9) that the trial court's finding of an avulsion is binding on this Court. Except for the errors noted herein in defendant's statement of the facts, the facts as set out in petitioner's (the State's) brief are undisputed. The question arises whether those facts support (1) an inference that what occurred at Fischer Cut, i.e., the major portion of the river moving through Fischer Cut, was sudden, and (2) even if it was sudden, the conclusion that it was an avulsion.

The process of erosion and enlargement of Fischer Cut occurred over a 20-year period and is described in detail commencing at page 5 of petitioner's brief in Case No. 75-567. No one knows how much river was flowing through the cut just before the flood of November 25, 1909 (this flood was one of the many that had occurred in the area; see pp. 5 and 7 of petitioner's brief). All

anyone knew was that in January of 1906, one-fourth of the river flowed through the cut. (Ex 110A, p. 1; A-103, Tr 231, 225). The trial court so found (A-181). This flow was at only the four foot stage (Ex 110A, p. 2, A-104, Tr 231, 225). After January of 1906 and two intervening floods, the last of which was on November 25, 1909, it was discovered that the main body of the river flowed over Fischer Cut. After 20 years of erosive floods, the factual inference of avulsion drawn by the trial court from this series of facts is open to serious question. As a *legal* matter, since two channels were already in existence, the conclusion of an avulsion is unsupportable.

In any event, the *factual* inference or *legal* conclusion of an avulsion in an essentially agreed upon factual setting are clearly not binding on this court where the state is asserting title under the Equal Footing Doctrine to the riverbed underlying Fischer Cut. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 771 (1945). *First National Bank of Hartford v. City of Hartford,* 273 U.S. 548, 552-553 (1927); *Great Northern Railroad Co. v. State of Washington*, 300 U.S. 154, 165-166 (1937); *Whitus v. State of Georgia,* 385 U.S. 545, 550 (1967).

For the reasons advanced at pages 20-27 of petitioner's (State's) brief in Case No. 75-567, and at pages 19-25 of respondent's (State's) brief in Case No. 75-577, the Court should not accept or follow the state court conclusion.

Respectfully submitted,

LEE JOHNSON
Attorney General

W. MICHAEL GILLETTE
Solicitor General

PETER S. HERMAN
Senior Counsel

Counsel for Petitioner

APPENDIX

Albany, Oreg.

1905	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	16.8	5.8	4.0	7.4	2.7	3.0	1.8	0.8	0.5	1.0	1.7	4.0
2	11.8	5.7	4.0	7.2	2.5	3.0	1.7	0.8	0.5	1.0	4.5	4.4
3	9.4	5.7	3.7	7.0	2.6	3.0	1.6	0.8	0.5	1.0	1.5	4.8
4	8.0	5.6	3.5	6.8	2.6	3.3	1.6	0.8	0.5	1.0	1.4	5.0
5	7.6	5.2	3.9	6.7	2.5	3.5	1.6	0.8	0.5	1.0	1.3	5.0
6	6.8	4.8	3.3	6.6	2.3	3.6	1.6	0.8	0.5	1.0	1.3	4.8
7	6.3	4.5	3.1	6.4	2.3	4.0	1.5	0.7	0.5	1.3	1.3	4.6
8	5.7	4.0	2.9	6.0	2.3	3.9	1.5	0.7	0.5	2.0	1.3	4.6
9	5.3	4.0	2.9	5.5	2.4	3.8	1.4	0.7	0.5	3.2	1.2	4.6
10	4.8	3.8	2.9	5.1	4.0	3.4	1.4	0.7	0.5	2.6	1.2	4.3
11	4.5	3.6	2.9	4.8	4.5	3.2	1.2	0.7	0.5	2.2	1.1	4.0
12	4.0	3.4	2.8	4.5	4.4	3.0	1.2	0.7	0.5	1.8	1.1	3.0
13	3.8	3.1	2.6	4.1	4.6	2.8	1.2	0.7	0.5	1.5	1.0	3.2
14	3.9	3.0	2.6	4.0	4.4	2.6	1.2	0.7	0.5	1.5	1.0	3.0
15	4.2	2.9	2.4	4.0	4.2	2.6	1.3	0.7	0.5	2.3	1.0	3.0
16	5.5	2.9	2.4	3.9	4.0	2.5	1.3	0.7	0.5	2.3	1.0	2.8
17	5.7	2.9	2.6	3.9	3.8	2.2	1.3	0.7	0.5	2.3	1.0	2.8
18	5.1	3.0	2.5	3.7	3.6	2.1	1.4	0.7	0.5	2.3	1.0	3.0
19	5.0	3.2	2.6	3.6	3.4	2.0	1.4	0.7	0.5	2.3	1.2	3.3
20	5.0	3.6	2.8	3.6	3.2	1.9	1.4	0.7	0.5	2.3	1.7	4.0
21	4.8	3.9	3.7	3.6	3.2	1.8	1.5	0.7	0.5	2.0	3.0	5.0
22	5.0	4.1	6.8	3.5	3.3	1.8	1.2	0.7	0.5	1.9	2.8	5.4
23	5.8	4.3	7.5	3.2	3.5	1.8	1.0	0.7	0.5	1.8	2.5	4.8
24	7.8	5.2	7.4	3.0	4.0	1.8	0.8	0.7	0.5	1.6	2.0	4.4
25	8.9	5.0	8.4	3.1	4.1	1.8	0.8	0.6	0.5	1.6	2.3	4.2
26	8.8	4.8	10.0	3.1	3.8	1.8	0.8	0.5	0.7	1.6	2.6	4.0
27	8.5	4.5	13.0	3.1	3.6	2.0	0.8	0.5	0.8	2.8	2.8	5.6
28	7.8	4.2	12.9	3.0	3.5	2.0	0.8	0.5	0.9	2.8	3.0	6.8
29	7.2	.....	11.0	2.9	3.4	2.0	0.8	0.5	1.0	2.6	3.0	5.4
30	6.7	.....	9.5	2.8	3.2	2.0	0.8	0.5	1.0	2.0	3.5	6.0
31	6.8	.....	8.0	.....	3.0	.....	0.8	0.5	.....	2.0	.....	6.8
Means	6.7	4.2	5.1	4.5	3.4	2.6	1.2	0.7	0.6	1.9	1.7	4.4

Albany, Oreg.

1906	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1	7.4	5.8	11.4	6.2	4.8	6.6	3.0	1.4	0.8	0.7	1.2	3.5
2	7.0	5.8	9.8	7.0	4.4	5.6	2.8	1.3	0.8	0.7	1.6	3.2
3	6.2	5.5	8.4	6.2	4.4	5.1	2.6	1.3	0.8	0.6	1.4	3.0
4	5.4	5.3	7.6	5.7	4.0	4.8	2.6	1.2	0.8	0.7	1.2	2.8
5	5.0	5.2	7.0	5.3	4.0	5.3	2.6	1.2	0.8	0.7	1.4	2.8
6	5.0	5.0	6.7	5.0	4.0	5.0	2.6	1.2	0.8	0.9	1.6	2.7
7	5.0	4.8	6.5	4.8	4.0	5.2	2.5	1.2	0.7	0.9	2.0	3.3
8	5.0	4.4	6.5	4.9	3.6	5.8	2.5	1.2	0.7	0.8	4.2	5.8
9	5.4	4.0	6.2	4.5	3.5	5.6	2.5	1.1	0.7	0.7	8.7	5.3
10	6.8	4.0	6.0	4.8	3.5	5.8	2.0	1.1	0.7	0.7	6.4	5.6
11	6.8	3.8	6.0	4.5	3.5	6.0	2.2	1.0	0.7	0.7	5.8	6.0
12	6.8	3.8	6.0	4.3	3.5	5.6	2.0	1.0	0.7	0.7	6.0	6.1
13	7.6	3.6	5.4	4.0	3.4	5.4	1.9	0.9	0.8	0.7	5.0	5.5
14	9.0	3.2	5.0	3.8	3.4	5.0	1.8	0.9	1.7	0.8	7.0	5.0
15	9.0	3.2	4.8	3.7	3.2	4.9	1.8	0.9	1.3	0.9	9.1	4.6
16	8.9	4.0	4.4	3.6	4.0	4.9	1.7	0.9	1.8	1.1	10.9	5.1
17	11.0	4.0	4.0	3.6	4.2	6.0	1.7	0.8	1.8	1.5	12.3	5.5
18	14.2	4.2	4.0	3.6	3.8	6.0	1.7	0.8	1.5	3.0	11.4	6.2
19	12.6	5.0	3.8	3.5	3.6	5.4	1.6	0.8	1.0	3.0	12.1	5.9
20	10.4	8.2	3.8	3.5	3.6	4.8	1.6	0.8	0.9	2.6	9.8	7.0
21	8.8	10.0	4.2	3.5	3.4	4.4	1.6	0.8	0.9	2.4	8.0	10.0
22	7.6	12.4	4.8	3.8	3.8	4.0	1.6	0.8	0.3	2.0	8.0	10.0
23	6.8	11.8	4.8	3.8	4.1	3.8	1.5	0.8	0.8	1.8	7.7	8.5
24	7.6	11.8	4.8	3.8	4.4	3.6	1.5	0.8	0.7	1.6	6.7	7.9
25	9.7	13.8	4.8	3.9	4.2	3.5	1.5	0.8	0.8	1.4	5.9	7.6
26	9.2	14.6	4.8	3.9	4.1	3.0	1.5	0.8	0.9	1.3	5.2	9.1
27	9.0	13.0	4.8	4.4	4.0	3.0	1.5	0.9	0.8	1.2	4.8	9.5
28	8.6	12.8	4.8	4.4	4.0	3.0	1.4	1.0	0.8	1.4	4.4	9.6
29	7.0	.....	4.4	4.9	4.4	3.0	1.4	1.0	0.7	1.5	4.0	8.0
30	6.5	.....	4.2	4.9	8.8	3.0	1.4	0.8	0.7	1.4	3.8	8.0
31	6.2	.....	4.4	.....	7.6	.....	1.4	0.8	.....	1.3	.....	7.2
Means	7.8	6.9	5.6	4.5	4.2	4.8	1.9	1.0	0.9	1.3	5.9	6.1

Supreme Court, U. S.
FILED
FEB 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

February, 1976

STATE PRINTING PLANT ◆ OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

February, 1976

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases Cited

Bilger v. State, 63 Wash. 457, 116 P. 19 (1911) 2
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 2, 6, 7, 11, 12, 13, 14
Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935) 9
Bert L. Cole v. Port of Woodland, U.S.D.C., W.D., Civil No. C75-140T, filed July 15, 1975 6
Coyle v. Smith, 221 U.S. 559 (1911) 8
DeLamar's Nevada Gold Mining Co. v. Nesbitt, 177 U.S. 523 (1900) 12
Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946) 2
Hughes v. Washington, 389 U.S. 290 (1967) 9
Illinois Central Ry. Co. v. Illinois, 146 U.S. 337 (1892) 8
Joy v. St. Louis, 201 U.S. 332 (1906) 10
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949) .. 6
Marine Ry. & Coal Co. v. United States, 257 U.S. 47 (1921) 11
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) 8
Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913) 11
Oregon v. Port of St. Helens, Ninth Circuit Court of Appeals, Docket No. 75-3525, Filed February 9, 1976 ... 6
Packer v. Bird, 137 U.S. 661 (1891) 3, 9
Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845) 8
Port of Seattle v. Oregon & Washington Ry. Co., 255 U.S. 56 (1921) 11, 13
Puget Mill Co. v. State, 93 Wash. 128, 160 P.2d 310 (1916) .. 13
Puget Sound Traction, Light & Power Co. v. Newell, 246 U.S. 649 (1917) 11
St. Anthony Falls Water Power Co. v. St. Paul Water Comm., 168 U.S. 349 (1897) 11
St. Louis v. Rutz, 138 U.S. 226 (1891) 10
Shively v. Bowlby, 152 U.S. 1 (1894) 8
State v. Corvallis Sand & Gravel Co., (Ore. App.) 526 P.2d 469 (1974); Aff'd 536 P.2d 517 (1975); reh. den 538 P.2d 70 (1975) 1, 2, 3, 7
United States v. Texas, 339 U.S. 707 (1950) 13

TABLE OF AUTHORITIES—Cont'd
STATUTES

	Page
*RCW 43.30.150(2)	4
RCW 79.68.080	5

OTHER AUTHORITIES

Constitution of the State of Washington Art. XVII, Sect. 1	3
Hopp, Federal Accretion Law, 50 Wash. L. Rev. 777 (1975)	10
Nelson v. State, Cowlitz County Superior Court No. 41072, filed November 3, 1975	6
Office of the Commissioner of Public Lands	5
1969-1970 Biennial Report, Department of Natural Resources	4
Weyerhaeuser Co. v. State, Cowlitz County Superior Court No. 41383, filed December 30, 1975	6
*Revised Code of Washington cited as RCW	

*Revised Code of Washington cited as RCW

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

STATEMENT OF INTEREST

The Court granted petitions for certiorari on two questions presented for review on January 12, 1976.[1] This brief is directed to the first question posed by the State of Oregon:

> "In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding 'suddenly' becomes the main channel, and the other channel eventually becomes unusable,

[1]The opinions of the state courts are *State v. Corvallis Sand & Gravel Co.*, (Ore. App.) 526 P.2d 469 (1974); Aff'd. 536 P.2d 517 (1975); reh.den. 538 P.2d 70 (1975). Reference in this brief will be to the Oregon Court of Appeals decision (526 P.2d 469).

does federal law deprive the public of title to the beds of both channels?"[2]

The question, as phrased by Oregon, suggests that it has already been deprived of title to the bed of the "unusable" or abandoned channel. Washington disagrees with the implication that Oregon has somehow lost title to the abandoned bed of the Willamette River by application of the rationale of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).[3] The primary thrust of our disagreement with the question posed cuts deeper than the local law interpretative problem of the abandoned riverbed.

The equal footing doctrine encompasses both proprietary and state interests. Washington submits that the *Bonelli* doctrine should be critically re-examined in light of its potentially severe impact upon aquatic and shore land titles in the Western States. Exceedingly grave propositions are advanced by the court below which, if left undiluted, emasculate the "core" of the equal footing doctrine and cast a pall upon long recognized spheres of state law dominance.[4] The notion that a state's title is depen-

[2]Washington will file a separate brief *amicus curiae* on the second question presented for review at a later date in accordance with the briefing schedule set by the Clerk.

[3]The issue of title to the abandoned bed of the river apparently was not litigated in the Oregon Court. See: 526 P.2d 469, 472-473 and ft.nt. 1. At any event, it was not decided by the court below. Under Washington law, the state owns the abandoned bed of a navigable river where a federal project designed to lower Lake Washington caused the river to dry up. *Ghione v. State*, 26 Wn.2d 635, 651, 175 P.2d 955 (1946); *Bilger v. State*, 63 Wash. 457, 116 P. 19 (1911).

[4]Our concern is illustrated by the lower court's declaration that the extent of a state's title to the beds and shores of navigable waters is to be determined ad hoc based upon loosely formulated equitable considerations.

"* * * So the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to *Bonelli* and other federal cases to determine *whether title to the bed passed to the state under the facts presented* in the case at bar." 526 P.2d at 476. (Emphasis supplied)

dent upon evidentiary proof of "need" under a strictured concept of "navigational purpose" plays havoc with the constitution, statutes, judicial decisions and management programs of long standing of the State of Washington.[5]

Washington's geographical configuration in its land mass relation to navigable waters, i.e., the Columbia River, Puget Sound and adjacent navigable river systems flowing from the Cascades, coastal waters and adjacent navigable river systems flowing from the Coastal Range, make the dimensions of *Bonelli*'s possible application breathtaking.

Under the express terms of its Enabling Act,[6] the Territory of Washington was guaranteed by Congress that, should it meet the conditions imposed and be admitted into the Union, thereupon it "shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation."[7] Upon its admission into the Union on November 11, 1889, Washington acquired title to a large amount of aquatic real estate.[8] Washington acquired title to the beds of navigable waters to their high water mark[9] as a part of the political decision to convert it from a territory into a state.

[5]526 P.2d 469 at 477.

[6]25 Stat. 676.

[7]Id., Sect. 7.

[8]Constitution of the State of Washington, Art. XVII, Sect. 1.

[9]*Packer v. Bird*, 137 U.S. 661, 671-672 (1891).

It is beyond the scope of this statement of interest to specifically identify the progression of Washington's treatment of aquatic lands lying below the high water mark of navigable waters since statehood.

A brief description of present state management programs and policies regarding state owned marine, aquatic and exposed riparian lands will serve to delineate the potential impact of *Bonelli* upon Washington.

The Washington Department of Natural Resources, Marine Lands Division, has been described in a report to the state legislature:

> "Among the primary responsibilities of this Department (of Natural Resources) are those activities affecting approximately 1,300 miles of state-owned tidelands, some 3,500 miles of state-owned shore lands along navigable rivers and lakes, 6,700 acres of harbor area and between 1,500 and 2,000 square miles of beds of navigable waters.
> * * *
> "The income from the Department's water area program totaled *$1,492,398.00."[10]

Income generated from state lands is not the *sine qua non*. Detailed management policies for these lands have been adopted by the Marine Lands Division of the Department of Natural Resources and approved by the State Board of Natural Resources.[11]

[10]1969-1970 Biennial Report, Department of Natural Resources at page 46. (*The dollar figure is for the biennium.) The Department's 1973 Annual Report at page 37 states that income from this program was approximately $800,000 for that year.

[11]The Board of Natural Resources establishes management policies for the Department of Natural Resources. RCW 43.30.150(2). The

> "The management plan for marine lands includes policies and guidelines for:
> 1. Navigation and commerce
> 2. Public use
> 3. Food, mineral and chemical production
> 4. Protection of the natural marine environment
> 5. Uses by abutting upland owners, and
> 6. Revenue production.
> "The policy statements and guidelines apply to all Department of Natural Resources managed tidelands, harbor areas and beds of navigable waters. They are the primary basis on which the Department's multiple use management plan and programs are developed. These policies apply only to Department of Natural Resources lands and not other government agencies that administer programs on marine lands."

Since statehood, there have been 25,021 sales of state owned tide and shore lands in Washington.[12] As of January 1, 1976, there are 1,498 active leases on state owned aquatic lands for such variegated purposes as recreational docks and wharves, log booming, sewer outfalls, mining, mineral prospecting, dredge disposal sites, state and municipal parks, public fishing, shellfish harvesting, oil and gas exploration and harbor area commercial activities.[13]

Questions will undoubtedly be raised concerning the validity of Washington's title, or that of its grantees, where shoreline movement occurs natur-

text of the policies is found in Appendix A to this brief. The policies are mandated by state law. RCW 79.68.080.

[12]Records of Tideland and Shoreland Deeds, Office of the Commissioner of Public Lands, Olympia, Washington.

[13]Records of Active Aquatic Land Leases, Office of the Commissioner of Public Lands, Olympia, Washington.

ally or with the aid of man.[14] Intertwined with this concern is the fact that Washington's prerogative, as a state, to continue to apply its established real property law to aquatic lands is challenged by *Bonelli, supra.* See argument, *infra,* at pp. 7-14.

The Court's perception of a federal question sufficient to invoke jurisdiction and the view that reference to "federal common law" whose contours are not clearly visible compels Washington, as *amicus curiae,* to submit that *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973) be modified. The admonition of Justice Frankfurter is apropos to our position.[15]

> "Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of ad hoc determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into

[14]Several suits have already been commenced which reach the issues generated by Bonelli. *Nelson v. State,* Cowlitz County Superior Court No. 41072: *Weyerhaeuser Co. v. State,* Cowlitz County Superior Court No. 41383; *Bert L. Cole v. Port of Woodland,* U.S.D.C., Western District of Washington, Civil No. C75-140T; *Oregon v. Port of St. Helens,* Docket No. 75-3525, Ninth Circuit Court of Appeals.

[15]*Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 705 (1949) (Dissenting Opinion)

> more fruitful harmony. The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going."

ARGUMENT

We perceive the issue to be whether a federal question is presented upon the facts of this case. None of the parcels of land in dispute raise a question regarding the boundary or original extent of the federal grant.[16] The paramount question involves the desirability of accepting the invitation of *Bonelli* to fashion federal common law to resolve disputes arising from rights, interests or title to lands where title ultimately derives from the federal government. Washington submits that *Bonelli* should be restricted in application to its peculiar facts[17] and state law (in this case, Oregon's) should be held to govern the dispute. The decision of the court below should be reversed and the case remanded for adjudication under state law.[18]

[16]Parcels 2A, 2B and 2C comprise lands below the ordinary high water mark of the river as it presently exists. (526 P.2d at 474) Parcel 1 comprises land between the ordinary low water mark and Corvallis' upland ownership boundary. The land was formed by accretion (526 P.2d at 478-479). Parcel 3 comprises land lying within the boundary of Corvallis' description but which is presently the bed of the navigable river due to an avulsive change in 1909. (526 P.2d at 473, 479) Parcels 5, 6 and 7 comprise lands between the line of ordinary high and ordinary low water along the river as it presently exists. Corvallis contends it acquired title under patents issued *under Oregon law.* (526 P.2d at 480)

[17]The result of *Bonelli* can be justified on the basis of the doctrine of reemergence. 414 U.S. at 330, ft.nt. 27.

[18]It is beyond the scope of our argument to suggest *how* Oregon should resolve these local issues upon remand. We express no view on that question.

Explication of the constitutional standard heretofore adopted by the Court necessitates reference to the building blocks of such a formulation. Under a long line of decisions of the Court, title to tidelands and the beds of navigable waters was transferred to a state upon its admission to the Union. This is so by virtue of a state's constitutional right to stand on an equal footing with the original 13 colonies which formed the Union.

Since the original states succeeded to the beds of navigable waters previously held by the English Crown, the Court has held that states subsequently admitted to the Union absorbed a like title. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 418 (1842); *Pollard v. Hagen*, 41 U.S. (3 How.) 212, 223 (1845); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894). The Court has referred to this condition of equality as if it were in inherent attribute of membership in the Federal Union. *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 434 (1892). The Court has held that Congress does not possess the power to withhold from subsequently admitted states any facet of sovereignty held by the original states. *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

A state's title to the beds of navigable waters derives from the equal footing doctrine. *Pollard v. Hagen*, *supra*. Which lands are and which lands are not transferred to the newly created states is necessarily a federal question. The federal law becomes the yardstick by which the quantum of initial title

and the boundaries wherein it is fixed is measured. In *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935), the Court concluded that the boundary between a grantee of a state's tideland and a federal patentee of the adjacent upland was the line of mean high tide. The Court said (296 U.S. at 22):

> "Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves ascertainment of the essential basis of a right asserted under federal law. *Packer v. Bird*, 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 87; *United States v. Holt Bank*, 270 U.S. 49, 55, 56; *United States v. Utah*, 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law, *Barney v. Keokuk*, 94 U.S. 324, 338; *Shively v. Bowlby*, *supra*, p. 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 73."[19]

The Court has recognized this rule and deferred

[19] *Hughes v. Washington*, 389 U.S. 290, 294 (1967) at ft. nt. 3 preserves the federal question distinction between establishment of boundaries of a federal grant and a state's entitlement to devise its own rules applicable to lands over which it had already acquired title. *Hughes* is not opposite to the views expressed herein.

to state law. In *St. Louis v. Rutz*, 138 U.S. 226, 242 (1891), the Court said:

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the waters edge, is a question in regard to a rule of property, which is governed by local law. (Citing cases)"

The parameters of the rule of deference to state law were further defined in *Joy v. St. Louis*, 201 U.S. 332, 342, 343 (1906):

> "In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed.
> • • •
> "As the land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."[20]

In the case at bar, Corvallis contends that parcel 1 of the disputed lands was formed by accretion.[21] Corvallis does not claim title to any of the parcels in

[20] In *Hopp, Federal Accretion Law*, 50 Wash. L. Rev. 777, 787, (1975), the author comments on *Bonelli's* apparent abandonment of this rule:

"Under *Joy*, a federal court's role is limited to determining the boundary at the time of the grant and before statehood. By holding that the Court has jurisdiction to decide the effects of post-patent movements of the river on the boundaries of federally granted land because the federal government is the source of title, the *Bonelli* Court has impliedly overruled *Joy* and created a new federal question of doubtful validity."

[21] 526 P.2d at 478.

question based on the boundaries of the original federal patent. Its claim is predicated upon post-statehood movement of the Willamette River. A federal question is not presented if the Court adheres to the enunciated principle."[22]

The efficacy of the original federal grant itself is not impaired by holding that state law controls the rights and interests in such lands. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm.*, 168 U.S. 349, 363 (1897). This rule has been applied to cases arising from Washington. The Court, per curiam, dismissed an appeal for want of a federal question upon the principle that state law had resolved the controversy. *Puget Sound Traction, Light & Power Co. v. Newell*, 246 U.S. 649 (1917). The Washington Supreme Court in that case had ruled, under state law, that petitioner's title as an upland owner did not extend into the bed of a navigable river even though the state had, itself, diverted its flow. *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811 (1913).[23]

In sum, the idea of measuring post-statehood river movements by reference to the federal common law[24] is at variance with a long line of decisions of

[22] A decision where the Court held that the United States retained title to a land fill placed on the bed of the Potomac River in the District of Columbia is *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921). The United States argued successfully the proprietary right of the state of Maryland to the bed as reclaimed by artificial means. 257 U.S. at 60.

[23] Another Washington case reaching the Court likewise applied this principle. *Port of Seattle v. Oregon & Washington Ry. Co.*, 255 U.S. 56, 63 (1921) states:

"Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law."

[24] *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 319-321 (1973).

the Court. It is likewise at variance with the rationale for the principle of deference to state law as stated by the Court in *DeLamar's Nevada Gold Mining Co. v. Nesbitt*, 177 U.S. 523, 527 (1900):

> "If the law were otherwise, then every land case wherein one of the parties claimed title, either immediately or remotely through a patent of the United States, would present a Federal question; and as most of the land titles in the Western States of this country are traceable back to a right under the laws of the United States, every such case might be held reviewable by this court on writ of error. This position is, of course, untenable."[25]

By way of contrast, *Bonelli* holds that the fact that a state's claim to title to the bed of a navigable stream is based on the equal footing doctrine "required the invocation of federal law to resolve the instant dispute." *Bonelli Cattle Co. v. Arizona*, *supra*, 414 U.S. at 330, ft. nt. 27. This is a direct contradiction of both the theory and purpose of the equal footing doctrine. The equal footing doctrine confirms a state's proprietary interest in submerged lands at the time of its admission. It also preserves a state's sovereign prerogative to apply its laws to such lands subject to the overriding federal navigational servitude. *Bonelli* destroys the very rule it purports

[25]The original 13 states and the State of Texas do not derive their title from the federal government. Those states are free to devise and apply their own rules regarding claims to lands exposed or submerged by river movement under the *Bonelli* doctrine. 414 U.S. at 336 (Stewart. J., dissenting) The result is, of course, contrary to the equal footing doctrine. See: 50 Wash. L. Rev. 777 at 790-792, Note 19, *supra*, where the point is made that every federal project involving a navigable waterway may work a transfer of title if *Bonelli*'s doctrine is extended.

to invoke in support of a new federal test of state ownership. State law governing title to beds of navigable waters is thus replaced by federal law contrary to the constitutional imperative.

The Court has carefully explained the three mile ocean exception to the equal footing doctrine by reference to the core principle in *United States v. Texas*, 339 U.S. 707, 719-720 (1950):

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagen*, *supra*) which would produce inequality among the States. For equality of States means that they are not 'less or greater, or different in dignity or power.' See *Coyle v. Smith*, 221 U.S. 559, 566. There is no need to take evidence to establish the meaning of 'equal footing.'"

We see no escape from the conclusion that *Bonelli Cattle Co. v. Arizona*, *supra*, represents an impermissible intrusion into long settled and established constitutional principles which recognize the efficacy of state property law.[26] Neither do we see the need to further slice the remaining core of the equal footing doctrine. *United States v. Texas*, *supra*. The alleged "windfall" to a state (*Bonelli*, p. 328) amounts to nothing more than a confirmation of preexistent title by application of settled local law.

[26]Washington's law early on has developed and been applied regarding title to the beds of navigable waters. In 1916 the state Supreme Court noted that the state's grant of title to tide lands is not questionable. *Puget Mill Co. v. State*, 93 Wash. 128, 134-135, 160 P.2d 310 (1916). See also: *Port of Seattle v. Oregon & Washington Ry. Co.*, 255 U.S. 56, 65 (1921).

CONCLUSION

In the instant case, the 1909 rechannelization of the Willamette River was found by the court below to be an avulsive change. The question presented regarding ownership of the present bed of the river should be resolved under Oregon law. A federal question is not presented in a case such as this where no issue is raised concerning the nature or extent of a federal grant. Natural or artificial shoreline movements often raise questions of title which have, under the equal footing doctrine, been historically resolved by application of state law. To the extent that *Bonelli Cattle Co. v. Arizona*, *supra*, is without a sound constitutional foundation, it should be abandoned.

For these reasons, the judgment of the Supreme Court of Oregon should be reversed and it should be directed to apply the law of its jurisdiction to resolve this title dispute.

Respectfully submitted,

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General
Temple of Justice,
Attorneys for Amicus Curiae
State of Washington

February, 1976

APPENDIX A

The Washington Board of Natural Resources by Resolution No. 165 dated April 3, 1973 adopted the following revised policies for management of state owned marine lands.

POLICY 1: Navigation and Commerce

To provide for navigation and commerce on tidelands, harbor areas and beds of navigable waters. Guidelines:

1. Priority consideration shall be given to meeting the expanding need for navigation and commerce on first class tidelands and existing harbor areas.
2. Prior to establishing new harbor areas for deep draft commerce, an up-to-date comprehensive study of national dependence on Washington State to provide for commerce must be completed and a statewide harbor development plan based on national and state needs must be developed.
3. Harbor lines will be adjusted, when justified, to provide reasonable opportunity to meet the future needs of commerce.
4. Water dependent uses of the tidelands, harbor areas and beds of navigable waters shall be given preference over other uses.
5. Several industries using the same harbor area facility shall be given preference over single industry use.
6. Harbor areas will be reserved for landings, wharves, streets and other conveniences to navigation, commerce, however, where no current constitu-

tional use is practical and other public uses are in demand, interim public use may be authorized.

7. Provisions will be made to minimize interference with surface navigation even though other uses have been allocated.

8. Development of additional sites for navigation and commerce will not generally be authorized on second class tidelands if existing first class tidelands can meet the need.

9. Development, such as floating piers and breakwaters, will be encouraged so as to provide alternatives for increasing capacity for waterborne commerce without imposing environmental costs of establishing new harbor areas and their associated dredging and maintenance.

10. Shallow draft uses, such as barge terminals and marinas, will be preferred over deep draft uses in areas requiring extensive maintenance dredging.

11. Anchorages and harbors of refuge may be allocated to provide protection and moorage space for watercraft.

12. To provide for public safety, comprehensive mooring buoy locations, lighting and marking plans and programs will be implemented.

POLICY 2: Public Use

To provide for the protection and improvement of marine lands for public use.

Guidelines:

1. Selected second class tideland tracts of 1,000 contiguous feet or more or smaller areas of special recre-

ational quality, which have not been withdrawn for governmental or aquacultural uses, will be managed for public use.

2. Whenever practical, leases of first class tideland will provide for public access to the water.

3. Areas of second class tidelands, designed for public use, will be identified as public use beaches, properly advertised and marked and will be maintained on a regular basis for public use.

4. Areas allocated for public use will not be managed to produce a profit for a concessionaire or the administering agency without a lease fee being charged.

5. Where the State owns the abutting uplands, priority will be given to joint development of the uplands and second class tidelands for public use.

6. Selected second class tidelands will be set aside for development of self-guiding marine nature walks.

7. Selected second class tidelands capable of clam or oyster production, except those designated for aquacultural uses, will be set aside for public use.

8. Provisions shall be made to insure that traditional sports fishing areas are protected from competing uses that create obstructions.

9. Notice will be served to the current lessees of tidelands allocated for future public use, that prior to renewal of current leases, such leases will be modified to permit public use or will be terminated.

10. Bedlands abutting upland parks shall be considered for underwater parks.

11. Motorized vehicular travel will not be permitted on Department of Natural Resources' managed public use tidelands.

12. In recognition of the increasing impact on the recreating public on the State's beaches, new programs will be devoted to public education about stewardship of State marine resources.

POLICY 3: Food, Mineral & Chemical Production

To provide for the production of food, minerals and chemicals on marine lands with preference given to renewable resource activities.

Guidelines:

1. Tidelands and beds of navigable waters, especially valuable for aquaculture, will be so designated and protected from conflicting uses which would limit their utility for this purpose.

2. Information shall be provided to encourage commercial aquacultural activity to expand into proper locations.

3. Provisions shall be made to insure that traditional commercial fishing areas are protected from competing uses that create obstructions.

4. Certain lands will be selected for habitat improvement where such environments can be improved by adding structures, materials and plants.

5. Whenever structures are used for aquaculture on the beds of navigable waters, they shall be located in such a way as to minimize the interference with navigation and fishing and minimize visual impacts.

6. Marine lands will be inventoried as to the location

of significant deposits of minerals and aggregates, and a determination made as to the significance and dependence of the State on such deposits.

POLICY 4: Protection of the Natural Marine Environment

To protect and enhance the quality of the natural marine environment.

Guidelines:

1. Provisions for leasing tidelands and beds shall include requirements for protecting the natural marine environment.

2. Areas of special educational or scientific interest or areas of special environmental importance may be withdrawn as reserves and protected from competing uses.

3. Provisions shall be made to insure that structures on Department of Natural Resources managed land are properly maintained.

4. Unsightly abandoned structures shall be removed from Department of Natural Resources marine lands as funds permit.

5. Long term commitments will be avoided when leasing for water dependent uses which are essential to the economy and public welfare, but have adverse environmental impacts. Leases and permits will not be issued for non-water dependent uses which have significant environmental impacts.

6. Easements or leases for the development of underwater pipelines and cables will not be granted except where adverse environmental impacts can be shown

to be less than the impact of upland alternative, and when granted will include proper provisions to insure against substantial or irrevocable damage to the environment.

7. Structures and uses on marine lands will be designed to provide for safe passage of migrating animals whose life cycle is dependent on such migration.

8. The use of floating breakwaters shall be encouraged as protective structures rather than using permanent earth and rock fills.

9. Second class tidelands will generally be maintained free of bulkheads.

10. Beach material from tidelands and beds will generally not be used to backfill bulkheads and seawalls.

11. Filling on second class tideland will generally not be permitted.

12. When material from tidelands and beds is permitted as backfill and when filling on second class tidelands is permitted, provisions to stabilize fill material will be required.

13. Spoil disposal sites will be provided on the beds of navigable waters for certain materials that are approved for such disposal by regulatory agencies.

POLICY 5: Uses by Abutting Upland Owners

To provide certain tidelands and bedlands for use by abutting upland owners and to consider certain riparian interests in the management of marine lands.

Guidelines:

1. When tidelands are leased to someone other than the abutting upland owner, such leases will provide for the abutting owner to reach the beds of navigable waters.

2. Second class tidelands not allocated for public use may be made available for lease to the abutting upland owner without providing for public use.

3. In those cases where tidelands are managed for public use, the rights of private upland owners abutting public use tidelands will be recognized by suitable marking of the intervening property lines and properly posting the tidal tract.

4. Anchorage areas on the beds of navigable waters shall be designated for use by upland owners for mooring boats.

5. To reduce the burden on marinas, private mooring buoys and floats associated with shoreline residences will be encouraged.

6. Where there is no interference with normal routes of navigation for watercraft, swim floats and mooring buoys will be authorized on tidelands and bedlands shoreward of the 3 fatham contour or within 500 feet of mean high tide, whichever is appropriate. The placement of floats and buoys beyond the 3 fathom contour or 500 feet will be evaluated on a case by case basis.

POLICY 6: Revenue Production

To manage the marine lands under a pricing system which will compensate the public for reduction in

the availability of the public lands due to private use and thereby produce revenue to reduce the general tax burden.

Guidelines:

1. The value of Department of Natural Resources managed tidelands and beds of navigable waters to the general public will be recognized by charging competing lessees the full market price for the land.
2. Lease rates may be reduced depending on the degree to which the use interferes with the public use of the same property. Total withdrawal for private use requires a full rental payment.
3. When the effects or marine uses have an identifiable adverse impact on Department of Natural Resources land, a value will be placed on the loss or impact and charged to the user.
4. Available revenue from leasing of marine lands shall be used for marine land management programs that are of direct benefit to the public.
5. First class tidelands and harbor areas, unless withdrawn by the Commissioner of Public Lands as recreational use property, will be managed to produce revenue and service to the public.
6. Lease rates may be reduced for up to five years as an incentive when lessees are involved in research or development work which is in the public interest.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of February, A.D. 1976.

Supreme Court, U. S.
FILED
FEB 26 1976
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board, *Petitioner and Respondent,*

vs.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, *Respondent and Petitioner.*

On Writ of Certiorari to the Supreme Court of Oregon

Brief for Amici Curiae States of California (by and through its State Lands Commission), Alabama, Alaska, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maryland, Montana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Texas, Virginia and West Virginia

EVELLE J. YOUNGER,
Attorney General of the State of California,
SANFORD N. GRUSKIN,
Chief Assistant Attorney General—Special Operations Division,
N. GREGORY TAYLOR,
Assistant Attorney General,
RUSSELL IUNGERICH,
JEROLD A. KRIEGER,
Deputy Attorneys General,
800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 620-2782, 620-2683,

(Continued on inside cover)

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

WILLIAM J. BAXLEY,
Attorney General of the State of Alabama,

AVRUM GROSS,
Attorney General of the State of Alaska,

ROBERT L. SHEVIN,
Attorney General of the State of Florida,

ARTHUR K. BOLTON,
Attorney General of the State of Georgia,

RONALD AMEMIYA,
Attorney General of the State of Hawaii,

WAYNE L. KIDWELL,
Attorney General of the State of Idaho,

THEODORE L. SENDAK,
Attorney General of the State of Indiana,

RICHARD C. TURNER,
Attorney General of the State of Iowa,

WILLIAM J. GUSTE, JR.,
Attorney General of the State of Louisiana,

FRANCIS B. BURCH,
Attorney General of the State of Maryland,

WARREN R. SPANNAUS,
Attorney General of the State of Minnesota,

A. F. SUMMER,
Attorney General of the State of Mississippi,

ROBERT L. WOODAHL,
Attorney General of the State of Montana,

PAUL L. DOUGLAS,
Attorney General of the State of Nebraska,

ROBERT LIST,
Attorney General of the State of Nevada,

WILLIAM F. HYLAND,
Attorney General of the State of New Jersey,

ALLEN I. OLSON,
Attorney General of the State of North Dakota,

DANIEL R. MCLEOD,
Attorney General of the State of South Carolina,

WILLIAM JANKLOW,
Attorney General of the State of South Dakota,

JOHN L. HILL,
Attorney General of the State of Texas,

ANDREW P. MILLER,
Attorney General of the Commonwealth of Virginia,

CHAUNCEY H. BROWNING, JR.,
Attorney General of the State of West Virginia,

Attorneys for Amici Curiae.

SUBJECT INDEX

Page

Interest of Amici Curiae 1

Summary of Argument 6

Argument 10

Absent a Claim Under a Federal Grant, a Wholly Intrastate Title Dispute Between a State and a Private Owner of Riparian Land Does Not Raise a Federal Question Essential to the Appellate Jurisdiction of This Court 10

A. Neither Bonelli nor the Instant Case Raises a Federal Question Arising Under the Equal-Footing Doctrine of the Submerged Lands Act 14

1. The Historic Role of the Equal-Footing Doctrine Has Been To Delimit the External Scope of State Sovereignty 14

2. The Equal-Footing Doctrine Creates Sovereign Title to Submerged Lands but Does Not Restrict the States in Resolving Title Disputes as a Matter of Internal Affairs 18

3. This Court Has Expressly Held That a Claim Based on Sovereign Title Does Not Raise a Federal Question .. 23

4. The Submerged Lands Act Did Not Convert Purely Local Title Questions Into Questions of Federal Law 25

Page

B. This Case Does Not Properly Arise Under the Federal Common Law 25

1. In This Case, the Court Is Not Called Upon to Construe the Terms of a Federal Land Grant 25

2. This Case Does Not Involve Any Other Federal Interest Justifying the Application of Federal Law 26

Conclusion 32

TABLE OF AUTHORITIES CITED

Cases Page

Arkansas v. Tennessee, 246 U.S. 158 (1918) 22

Barney v. Keokuk, 94 U.S. 324 (1876) 4, 21, 23

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) .....2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 17, 18 .....19, 21, 23, 25, 26, 29, 30, 31, 32, 33

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) 19, 25, 26

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) 13

Carpenter v. City of Santa Monica, 63 Cal.App.2d 772, 147 P.2d 964 (1944) 32

City of New Orleans v. DeArmas, 34 U.S. (9 Pet.) 224 (1835) 24

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 30, 31

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 27

Cooly v. Golden, 117 Mo. 33, 235 N.W. 100 (1892) 31

Coyle v. Smith, 221 U.S. 559 (1911) 3, 6, 14, 15, 16, 17

Cross v. Burke, 146 U.S. 82 (1892) 12

Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944) 28

Dick v. United States, 208 U.S. 340 (1908) ..17, 18

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 27, 28

Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927) 7, 21, 22

Page

Hagans v. Lavine, 415 U.S. 528 (1974) 6, 12
Hardin v. Jordan, 140 U.S. 371 (1891) 20, 21, 22
Helvering v. Hallock, 309 U.S. 106 (1940) 13
Huddleston v. Dwyer, 322 U.S. 232 (1944) 23
Illinois v. City of Milwaukee, 406 U.S. 91 (1972) .. 29
Illinois Central Railroad Co. v. Chicago, 176 U.S. 646 (1900) 23
Iowa v. Rood, 187 U.S. 87 (1902) 7, 23, 24
Kansas v. Colorado, 206 U.S. 46 (1907) 27
Knapp v. Schweitzer, 357 U.S. 371 (1958) 23
Knight v. U.S. Land Ass'n, 142 U.S. 161 (1891) .. 20
Louisville Trust Co. v. Knott, 191 U.S. 225 (1903) 12
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 12
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) 19, 20, 21
Mather v. State, 200 N.W.2d 498 (Iowa 1972) 31
Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867) 20, 21
Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) 12
Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853) 18
Packer v. Bird, 137 U.S. 661 (1891) 32
Parker v. Brown, 317 U.S. 341 (1943) 18
Pennoyer v. Neff, 95 U.S. 714 (1877) 18
Perry v. Erling, 132 N.W.2d 889 (N.Dak. 1965) .. 31

Page

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 20, 21
Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 18
Richardson v. Sims, 118 Miss. 728, 80 So. 4 (1918) 31
St. Louis v. Rutz, 138 U.S. 226 (1891) 23
Shively v. Bowlby, 152 U.S. 1 (1894) 20, 22
Snow v. United States, 118 U.S. 346 (1886) 12
State v. Sause, 217 Or. 52, 342 P.2d 803 (1959) 31, 32
Texas v. Louisiana, 410 U.S. 702 (1973) 20
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 8, 28
United States v. Harrison County, 399 F.2d 485 (5th Cir. 1968) 32
United States v. Holt State Bank, 270 U.S. 49 (1926) 20
United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) 28
United States v. Maine, 420 U.S. 515 (1975) 27
United States v. More, 7 U.S. (3 Cranch) 159 (1806) 12
United States v. Oregon, 295 U.S. 1 (1935) 20
United States v. Texas, 339 U.S. 707 (1950) 6, 16, 17, 20
United States v. Yazell, 382 U.S. 341 (1966) 28
United States ex rel. Arant v. Lane, 245 U.S. 166 (1917) 12
Utah v. United States, 403 U.S. 9 (1971) 19

Page

Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) 20, 21

Wemmer v. Young, 167 Neb. 495, 93 N.W.2d 837 (1958) 31

United States Constitution

Art. III 11, 12
Art. IV, § 3 ..... 16, 24
Tenth Amendment 18

Statutes

28 U.S.C. § 1331(a) 29
28 U.S.C. § 1441 ..... 3, 29
43 U.S.C. § 1301 25

Book

H. Friendly, Federal Jurisdiction: A General View, pp. 19-54 (1973) 29

Articles

Burger, Yearend Report, 62 A.B.A.J., p. 189 (Feb. 1976) 29

Hanna, Equal Footing in the Admission of States, 3 Baylor L. Rev., pp. 519, 523 (1951) 14

Leighty, The Source and Scope of Public and Private Rights in Navigable Waters, 5 Land & Water L. Rev., pp. 391, 416 (1970) 14, 15

Mishkin, The Variousness of "Federal Law": Competence in Discretion in the Choice of National and State Rules for Decisions, 105 U. Penn. L. Rev., pp. 797, 799 (1957) 27

Note, 50 Wash. L. Rev., pp. 777, 786 (1975) 19

Statistical Abstract of the United States (1974), pp. 171-72 4

IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner and Respondent,

vs.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent and Petitioner.

On Writ of Certiorari to the Supreme Court of Oregon

Brief for Amici Curiae States of California (by and through its State Lands Commission), Alabama, Alaska, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maryland, Montana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Texas, Virginia and West Virginia

Interest of Amici Curiae

This case involves a controversy between the State of Oregon and a riparian landowner both claiming title to riverbed land lying beneath a wholly intrastate section of the Willamette River in Oregon. The land here in dispute does not lie on any interstate boundary. Nor does the record disclose that the riparian

landowner is claiming under a pre-statehood or post-statehood federal land patent. Both parties invoke the appellate jurisdiction of this Court to decide a federal question arising under the federal common law as explicated in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

California and the other States which join with it on this brief contend that *Bonelli* did not present, nor does this case present, a federal question conferring jurisdiction upon this Court. Until *Bonelli* this Court had consistently recognized that within their respective boundaries, the States were the sovereign holders of absolute title to all lands lying beneath their navigable waterways and tidewaters. *Bonelli* cast a cloud upon this title by holding that a State's title to lands formerly beneath navigable waters could be diminished by the operation of federal common law. The present case threatens to extend the reach of federal common law even further since the Oregon courts have applied *Bonelli* to divest the State of its title to lands still submerged on the bed of the Willamette River. If federal common law controls this dispute, California and its sister States are concerned that their once absolute ownership of the lands beneath their navigable waters and lakes and their tidewaters may be reduced to nothing more than a navigational servitude. If this case truly presents a federal question arising under the Equal-Footing Doctrine or the Submerged Lands Act, then there may remain no case in which state law exclusively controls a dispute involving title to sovereign lands[1] lying wholly within the borders of

[1]The term "sovereign lands" as used in this brief denotes all lands lying beneath navigable waters and tidewaters within the borders of a State.

a single State. All of these local title disputes may have been transmuted into federal cases coming within both the original jurisdiction of the federal district courts and the appellate jurisdiction of this Court on certiorari. Whenever a State brings an action in ejectment or to quiet title to submerged, accreted, or relicted lands, the defendants may be able to remove the case to a federal district court pursuant to 28 U.S.C. §1441. Even in those cases where the litigation is filed in state court and remains there, state rules of property may be forced to yield to this Court's supervisory view of the federal common law.

California and the other States joining with it in this brief are seriously concerned that this litigation threatens to destroy our perfect Union of 50 sovereign States fully equal in the rights and prerogatives which they exercise within their respective borders. This Court's diminution of the title to sovereign lands held by States owing their sovereign existence to Acts of Congress can only result in abrogation of the Equal-Footing Doctrine. To paraphrase George Orwell, some States will be more equal than others. In *Coyle v. Smith*, 221 U.S. 559, 580 (1911), this Court stated:

> ". . . [T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

It is to preserve the constitutional equality of the States essential to the "Union of the Constitution" that members of the Original Thirteen States join other States more recently admitted in urging this Court

to remove the cloud of federal common law which it has placed upon the sovereign title of the latter 37 States to the sovereign lands within their respective boundaries.

The sovereign lands of the States of the Union are considerable. Outside the Original Thirteen States,[2] there are 68,614 square miles of land covered by inland waters and 66,769 miles of tidal shoreline.[3] *Statistical Abstract of the United States, 1974,* 171-72. *Bonelli* suggests that, to some as yet undefined extent, the States admitted to the Union by acts of Congress may not be the absolute owners of the lands beneath their navigable waters and tidewaters. Instead, *Bonelli* intimates that long settled ownership rights of the States in these sovereign lands may be subject to defeasance unless the State can demonstrate that title to these lands is "necessary to any navigational or related purpose." *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 331. Until this Court limits the broad language of *Bonelli,* the States are faced with the prospect of a plethora of litigation challenging state title to sovereign lands.

Although the sovereign lands in question lie at the bottom of navigable lakes and rivers or are washed by the tides, their location does not in any way diminish their importance to the States which own them. Historically, ownership of these lands has been essential

[2]The sovereign lands of the Original Thirteen States are probably not affected by *Bonelli. See Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 336 (dissenting opinion of Stewart, J.).

[3]It should be noted that not all States claim ownership of lands beneath inland navigable waters. In *Barney v. Keokuk,* 94 U.S. 324, 338 (1876), the Court recognized that States may choose "to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity . . . ."

to state interests in the protection of commerce, navigation and fishery. Mineral leases on these lands also produce valuable revenues for the public good. Many States like Oregon collect royalties for the removal of sand and gravel from their riverbeds. Oil and gas leases are also common. In California alone, these sovereign lands account for $147,000,000 annually in revenues from various types of mineral leases. These revenues finance California higher education, including the University of California and the state university system, and fund the California water project.

The suggestion in *Bonelli* that state title to sovereign lands is defeasible places a cloud on a host of private titles as well. As Mr. Justice Stewart noted in his *Bonelli* dissent, title to land patented by the State to private individuals can be no greater than the title held by the State as grantor. *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 332 n. 1. Many States have issued patents for abandoned riverbeds and tidelands. Does the very fact of a sale demonstrate lack of public purpose and hence defeasible title? If so, the cloud on private titles is one of staggering proportions. For example, California has issued over 472 tideland patents to private parties. More than 80,000 acres are included within the perimeter descriptions of these patents, and substantial portions of the business districts of San Francisco, Oakland, Long Beach, San Diego, San Raphael, and Eureka have been built on reclaimed lands within their patents. If *Bonelli* is susceptible of application to these private title cases as well, both state and federal courts may be inundated with litigation emanating from this source.

SUMMARY OF ARGUMENT

Certiorari was granted in this case to consider various questions arising under the federal common law as announced in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973). The States joining in this *amici curiae* brief contend that *Bonelli* should not be controlling precedent for decision of the intrastate title dispute involved in this case. There was no federal question conferring appellate jurisdiction on this Court in *Bonelli,* and the existence of a federal question was not challenged there. When a question of jurisdiction has not been contested in a prior case, the exercise of jurisdiction in such a case has normally not been deemed to be precedent in a subsequent case which finally brings jurisdictional issue before this Court. *Hagans v. Lavine,* 415 U.S. 528, 533-35 n. 5 (1974). Moreover, even if the question of jurisdiction had been raised and decided in *Bonelli, amici* would still urge this Court to reconsider that decision because *Bonelli* is such a significant departure from this Court's otherwise consistent recognition of state sovereignty over lands beneath navigable waters and tidewaters wholly within State borders.

This case does not raise, nor did *Bonelli* raise, a federal question arising under the Equal-Footing Doctrine or the Submerged Lands Act. The Equal-Footing Doctrine properly serves only to delimit the peripheries of state and national sovereignty by drawing boundary lines forbidding the intrusion of one into the exclusive province of the other. Until *Bonelli,* the Equal-Footing Doctrine served only this external purpose. *See Coyle v. Smith,* 221 U.S. 559 (1911); *United States v. Texas,* 339 U.S. 707 (1950). It had never been applied

to restrict a single State's exclusive jurisdiction over its own internal affairs.

Since absolute title to lands beneath navigable waters and tidewaters passed to new States upon their admission to the Union, there is no federal question as to "how far the State's sovereign right extends under the Equal-Footing Doctrine." *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 319. The title which vested as an incident of sovereignty was full, complete and absolute. No greater title could have been obtained, and no State could possibly exceed the scope of the title that it already possessed.

The absence of a federal question is further demonstrated by the fact that all questions as to the scope of a State's sovereign title have been exclusively confided to the state courts for determination. In *Fox River Paper Co. v. Railroad Comm'n,* 274 U.S. 651, 655 (1927), this Court stated that ". . . the nature and extent of the rights of the state and riparian owners in navigable waters within the state and the floor beneath are matters of state law to be determined by the statutes and judicial decisions of the state." Numerous decisions of this Court have applied this general rule to a variety of title disputes and have found them all to involve questions of state, and not federal, law. Indeed, in *Iowa v. Rood,* 187 U.S. 87 (1902), this Court expressly held that a State's claim of sovereign title did not raise a federal question conferring appellate jurisdiction upon this Court.

Thus, the state sovereignty created under compulsion of the Equal-Footing Doctrine necessarily includes the right of the State to determine questions of title between itself and riparian owners under its own law and in

its own courts. Ordinarly the decision of the highest court of each State on matters of state law is deemed to be conclusive in this Court. *Bonelli* contravenes this well-established principle. It intrudes the federal common law into an area that has always been regarded as the exclusive province of the States. For this reason, it should be reconsidered before it makes further inroads into the vital balance between state and national sovereignty.

Finally, *Bonelli* should be reconsidered because it does not involve a proper application of the federal common law. While federal law may be needed to protect the federal rights of a grantee holding under a federal patent, federal supervision is not needed to protect the title to those lands whose ownership vested in the States as an incident of sovereignty. As a sovereign, a State has its own courts and its own rules of property to protect its title. While "[i]t is not uncommon for federal courts to fashion federal law when federal rights are involved," *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), the logical converse of this precept is that the federal courts lack the power to fashion federal law when no federal right or interest is involved.

The wholly intrastate title dispute presented here is most assuredly a case lacking any federal interest to justify application of federal common law. If *Bonelli* has expanded federal question jurisdiction for intrastate title disputes, it can only serve to congest already

backlogged federal district courts. The longstanding existence of diverse state rules governing riparian ownership militates against any need for a uniform rule imposed as a matter of federal common law. If state law may properly govern the rights of federal patentees whose property borders on navigable streams, there is little sense in applying federal common law to decide local title questions when neither the State nor the private riparian owner traces its title to a federal grant.

ARGUMENT

ABSENT A CLAIM UNDER A FEDERAL GRANT, A WHOLLY INTRASTATE TITLE DISPUTE BETWEEN A STATE AND A PRIVATE OWNER OF RIPARIAN LAND DOES NOT RAISE A FEDERAL QUESTION ESSENTIAL TO THE APPELLATE JURISDICTION OF THIS COURT

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), involved a controversy between the State of Arizona and a riparian landowner over title to a portion of the bed of the Colorado River which was exposed when the river waters receded as a result of a federal rechanneling project. This Court held that federal common law, and not Arizona law, governed the resolution of the conflicting claims to the exposed bed of this navigable river.

This choice-of-law result was in no way predicated on the fact that the property in dispute was in close proximity to the interstate boundary between Arizona and Nevada because all of the land exposed by the receding waters of the Colorado River lay between the new riverbed clearly owned to midchannel by the State of Arizona and the old high water mark which was the waterward boundary of the parcel owned by the Bonelli Cattle Company. Nor did this Court's decision turn on the fact that the Bonelli Cattle Company traced its title to a pre-statehood federal patent because the Court expressly declined to rest its choice-of-law result on the scope of the federal patent. *See* 414 U.S. at 321, n. 11. Thus, neither the interstate boundary nor the federal patent in the petitioner's chain of title supplied the Court with a basis for

applying federal common law to the purely intrastate law title question presented by the facts.

Rejecting petitioner Bonelli's claim based on construction of the scope of the federal patent, this Court reformulated the issue in the following words:

> ". . . The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a 'right asserted under federal law.'" (414 U.S. at 320-21.) (Footnote omitted.)

The opinion explains that it was unnecessary for the Court to decide whether the rights conferred by the pre-statehood federal patent compelled the application of federal law ". . . because the State's claim in this case is premised on a construction of the federal equal-footing doctrine and the congressionally enacted Submerged Lands Act." (*Id.* at 321, n. 11.) Later in the opinion this Court stated that "it is only the State's claim to title under the equal-footing doctrine which required the invocation of federal law to resolve the instant dispute." (*Id.* at 330, n. 27.)

In the present controversy, the Oregon Supreme Court has applied *Bonelli* to deny the State of Oregon title to an intrastate portion of the bed of Willamette River. The *Bonelli* decision is controlling precedent here if, and only if, the controversy there raised a federal question properly invoking the appellate jurisdiction of this Court. Under article III of the United

States Constitution, the appellate jurisdiction of this Court is ". . . capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816). Since *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), however, it has been settled that the appellate jurisdiction is limited to the correction of errors relating solely to federal law. In *Murdock*, the Courts stated:

> ". . . the state courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." 87 U.S. (20 Wall.) at 626.

It does not appear that any of the parties or *amici* in *Bonelli* challenged the existence of the federal question as formulated by this Court. Since the existence of a federal question is critical to the appellate jurisdiction of this Court, *amici* submit that the point remains open here. When a question of jurisdiction has not been contested in a prior case, the exercise of jurisdiction under these circumstances has not been deemed to be precedent and this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it. *Hagans v. Lavine*, 415 U.S. 528, 533-35, n. 5 (1974); *United States ex rel. Arant v. Lane*, 245 U.S. 166, 170 (1917); *Louisville Trust Co. v. Knott*, 191 U.S. 225, 236 (1903); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Snow v. United States*, 118 U.S. 346, 354 (1886); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1806).

Even if the question of jurisdiction had been raised and decided in *Bonelli*, *amici* would still urge this Court to reconsider its ruling. Prior to *Bonelli*, this Court had consistently recognized that the States were the absolute owners of the lands beneath their navigable waters and their tidewaters as an incident of sovereignty. Until *Bonelli*, this Court had traditionally respected each State's power to decide under its own law all questions of title to the beds of navigable waters and the lands adjacent thereto when situated wholly within the boundaries of a single state. Since *Bonelli* is so markedly inconsistent with these settled lines of cases, the doctrine of *stare decisis* should not preclude reconsideration of *Bonelli* in this case. As Mr. Justice Frankfurter wrote for the Court:

> "[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

It is precisely because *Bonelli* stands as such a significant departure from this Court's otherwise consistent recognition of state sovereignty over submerged lands that *Bonelli* should be reconsidered for the virtually identical reasons that prompted reconsideration of a very recent decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241 (1970).

A. Neither Bonelli nor the Instant Case Raises a Federal Question Arising Under the Equal-Footing Doctrine or the Submerged Lands Act

1. The Historic Role of the Equal-Footing Doctrine Has Been To Delimit the External Scope of State Sovereignty

The term "equal footing" does not appear in the United States Constitution, nor was it employed in the Articles of Confederation. It finds its historical origin in the fact that some of the members of the original Confederation owned land outside their boundaries. *See generally,* Hanna, *Equal Footing in the Admission of States,* 3 Baylor L. Rev. 519, 523 (1951), for history of the Equal-Footing Doctrine. In 1784, Virginia ceded lands northwest of the Ohio River to the Confederation on the condition, among others, that new States should be created and admitted under the Articles of Confederation with the same rights of sovereignty, freedom and independence as the other States. This act of acceptance was superseded by the Northwest Ordinance of 1787, which included the provision that each State was to be admitted into the Congress of the United States on an equal footing with the original States in all respects. After the adoption of the Constitution, the Northwest Ordinance was reenacted in 1789. The expression "equal footing" or its equivalent has been used in the acts of Congress admitting all other new States to the Union, commencing with Tennessee in 1796. *Coyle v. Smith,* 221 U.S. 559, 567 (1911). For a compilation of these Acts, *see* Leighty, *The Source and Scope of Public and*

Private Rights in Navigable Waters, 5 Land & Water L. Rev. 391, 416, n. 4 (1970).

Prior to the *Bonelli* decision, the Equal-Footing Doctrine had never been applied to restrict any state in the conduct of its internal affairs. Rather it served to define the respective boundaries between state and federal sovereignty. In *Coyle v. Smith,* 221 U.S. 559 (1911), the Court employed the Equal-Footing Doctrine to invalidate a provision in the congressional act admitting Oklahoma to the Union that attempted to prohibit the new State from moving its capital to a new location for a given number of years. The Court reasoned that since one of the Original Thirteen States could not be shorn of this power to move its capital by an act of Congress, a newly admitted State could not be so restricted by a provision in a congressional act of admission. The Court stated:

> ". . . [W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and . . . such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." (221 U.S. at 573.)

Coyle, and the cases that opinion relied upon, established the proposition that the Equal-Footing Doctrine prohibited the federal government from creating new

States that were any less sovereign than those already members of the Union. *Coyle* observed that the power of Congress set forth in article IV, section 3 of the Constitution was to admit "new States into this Union." The Court interpreted this phraseology as follows:

> " 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission." (221 U.S. at 567.)

The Equal-Footing Doctrine is not only a limitation upon the extent to which the federal government may limit the sovereign powers of newly admitted States, but it also serves to limit State intrusions upon national sovereignty. *United States v. Texas,* 339 U.S. 707 (1950), was such a case. Even though Texas as

an independent republic might have had greater rights prior to admission to the Union, the Court held that Texas after admission had no greater rights in the marginal sea than any other State. The Court observed:

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States." (*Id.* at 719-20.) (Citation omitted.)

Neither *Coyle v. Smith* nor *United States v. Texas* intimates that the Equal-Footing Doctrine in any way limits a State's exercise of sovereignty within its own borders. The teaching of these cases is that the Equal-Footing Doctrine serves only to delimit the peripheries of state and national sovereignty by drawing boundary lines forbidding the intrusion of one into the exclusive province of the other.

Until *Bonelli,* the Equal-Footing Doctrine served only to define these external boundaries. It had never been applied to restrict a single State's exclusive jurisdiction over its own internal affairs. In *Dick v. United States,* 208 U.S. 340, 350 (1908), the Court clearly indicated that the Equal-Footing Doctrine was not a limitation upon a State's internal affairs when it stated:

> ". . . A State upon its admission to the Union, is thereafter upon equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by provisions of the

Federal Constitution or its own Constitution." *Accord: Parker v. Brown,* 317 U.S. 341, 360 (1943); *Pennoyer v. Neff,* 95 U.S. 714, 722 (1877); *Ohio Life Ins. & Trust Co. v. Debolt,* 57 U.S. (16 How.) 416, 428 (1853); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 719 (1838).

Such language unmistakably indicates that what federal limitations there are upon the internal sovereignty of a State must be found not in the Equal-Footing Doctrine but in other constitutional limitations.

Insofar as the *Bonelli* decision misconceives the nature of the Equal-Footing Doctrine and applies it to restrict the title of the States as to their sovereign lands, it intrudes the federal common law into an area that has always been regarded as the exclusive province of the States. Such an intrusion is in derogation of the Tenth Amendment to the United States Constitution which provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. The Equal-Footing Doctrine Creates Sovereign Title to Submerged Lands but Does Not Restrict the States in Resolving Title Disputes as a Matter of Internal Affairs

In *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 319, this Court stated the federal question to be "not what rights the State accorded private owners in the land which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal footing doctrine and the Submerged Lands Act. . . ." Thus, the Court appears to have treated the passage of title from the federal government to

each State admitted to the Union by act of Congress as if it were a federal grant of sovereign land. At one point in the opinion, the Court refers to the vesting of title to sovereign lands at statehood as a "grant to the State." 414 U.S. at 323. One commentator has questioned this use of the term "grant" because it implies a choice on the part of the grantor to convey or not to convey; Congress had no such choice since it was powerless to withhold from new States any aspect of sovereignty held by the Original States. Note, 50 Wash. L. Rev. 777, 786 (1975). By this inapt analogy to a federal grant, the Court was led, *a fortiori,* to the conclusions that a federal question was presented and that federal law governed the scope of the grant.

Of course, the interpretation of the scope of a federal patent is properly the subject of federal law. *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 22 (1935). But the vesting of title to sovereign lands in new States upon their admission to the Union cannot be equated to the right of ownership conveyed by a federal grant which is thereafter governed by federal law. The operation of the equal-footing principle has been said to have accorded newly admitted States the same property interests in sovereign lands as were enjoyed by the Thirteen Original States as successors to the British Crown. *Utah v. United States,* 403 U.S. 9, 10 (1971). After the American Revolution, the Original Thirteen Colonies succeeded the Crown and ". . . in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell,* 41 U.S. (16 Pet.)

367, 410 (1842). It has been long settled that the shores of navigable waters and the soils under them in the Original States were not granted by the Constitution to the United States, but were reserved to the several States, *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867). In the territories acquired by Congress, whether by cession from the original States or by treaty with a foreign country, the United States held title to the lands beneath navigable waters and tidewaters in trust for future States. *Shively v. Bowlby,* 152 U.S. 1, 48-50 (1894). When new states were formed out of the federal territories, they were "admitted into the Union on an equal footing with the Original States. . . ." *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845).

Under the Equal-Footing Doctrine, title to lands beneath navigable waters and tidewaters passed from the federal government to the new States upon their admission to the Union. *Texas v. Louisiana,* 410 U.S. 702, 710 (1973) (navigable waters); *Weber v. Harbor Comm'rs,* 85 U.S. (18 Wall.) 57, 65-66 (1873) (tidelands). Since the original States had reserved to themselves the absolute ownership of, and dominion and sovereignty over, all lands beneath navigable and tidewaters, States later admitted "have the same rights, sovereignty and jurisdiction in that behalf as the original States possess in their respective borders." *Knight v. United States Land Ass'n,* 142 U.S. 116, 163 (1891). *Accord: United States v. Texas,* 339 U.S. 707, 716-17 (1950); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Holt State Bank,* 270 U.S. 49, 54-55 (1926); *Shively v. Bowlby,* 152 U.S. 1, 26, 57-58 (1894); *Hardin v. Jordan,* 140 U.S. 371,

381-82 (1891); *Barney v. Keokuk,* 94 U.S. 324, 338 (1876); *Weber v. Harbor Comm'rs,* 85 U.S. (18 Wall.) 57, 65-66 (1873); *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845); *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

Since full and complete title vested in new States upon their admission to the Union, it is difficult to see how any federal question could arise under the Equal-Footing Doctrine. The title vested as an incident of sovereignty was full, complete and absolute. No greater title could be obtained, and no State could possibly exceed the scope of the title that it already possessed. Therefore when this Court asked in *Bonelli* "how far the State's sovereign rights extends under the equal-footing doctrine" (414 U.S. at 319), there was no federal question because the prior decisions of this Court have already answered it.

Moreover, the absence of a federal question is further demonstrated by the fact that all questions as to the scope of a State's sovereign title have been exclusively confided to the state courts for determination. As a sovereign, the State is not only the owner of the beds of its navigable waters and tidelands but is also vested with the power to formulate and apply its own local rules of property with respect to these lands. The decisions of this Court are replete with statements to that effect.

In *Fox River Paper Co. v. Railroad Comm'n,* 274 U.S. 651, 655 (1927), the Court stated that ". . . the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and the soil beneath are matters of state law to be

determined by the statutes and judicial decision of the state." In *Shively v. Bowlby*, 152 U.S. 1 (1894), the principle that state law governs the adjudication of riparian property rights was necessarily implied from the Equal-Footing Doctrine:

> "[T]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tidewaters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." (*Id.* at 57-58.)

Although the State is the absolute owner of its submerged lands and tide lands, ". . . it depends on the law of each state as to what waters and what extent this prerogative of the State over the lands under water shall be exercised." *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). State law controls the extent of the fee, whether increased or diminished by the processes of accretion, erosion, reliction or avulsion. When accretion or an avulsive change occurs solely within the boundary of a single State, this Court has applied the following general rule:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Arkansas v. Tennessee*, 246 U.S. 158, 175-76 (1918).

The title to land acquired by accretion has long been held to be ". . . a title acquired under operation of the law of the State, which each State determines for itself." *St. Louis v. Rutz*, 138 U.S. 226, 250 (1891); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876).

It would thus appear that the State sovereignty created under compulsion of the Equal-Footing Doctrine necessarily includes the right of the State to determine questions of title between itself and riparian owners under its own law and in its own courts. Ordinarily the decision of the highest court of each State on matters of state law is deemed to be conclusive in this Court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *Illinois Central Railroad Co. v. Chicago*, 176 U.S. 646, 659 (1900). In this regard the *Bonelli* contravenes the well-established rule. *Bonelli* should therefore be reconsidered before it has an opportunity to do violence to "the vital principle of federalism that a state court is the final arbiter of state law." *Knapp v. Schweitzer*, 357 U.S. 371, 382 (1958) (separate opinion of Warren, C. J.).

3. This Court Has Expressly Held That a Claim Based on Sovereign Title Does Not Raise a Federal Question

Prior to *Bonelli*, this Court had already concluded that the extent of sovereign title did not raise a federal question concerning appellate jurisdiction upon this Court. Not considered in *Bonelli* was the case of *Iowa v. Rood*, 187 U.S. 87 (1902). This case involved a dispute over the title to 800 acres of land lying on the bed of an inland lake. The State of Iowa intervened in the action and claimed to own the land by virtue of its right of sovereignty over the beds

of all lakes meandered by the general government. The state courts rejected Iowa's claim of sovereign title and quieted title in private claimants.

Upon a writ of error to this Court, Iowa asserted that its claim of sovereign title raised federal questions arising under (1) provisions of the Louisiana Purchase treaty with France; (2) Article IV, section 3, declaring that "new states may be admitted by the Congress into this Union"; and (3) the act of Congress of 1846, admitting the State of Iowa into the Union with the standard equal-footing proviso.

The Court dismissed the writ of error for want of a federal question arising under the treaty, the Constitution or the act of Congress. Relying on Chief Justice Marshall's decision in *City of New Orleans v. DeArmas*, 34 U.S. (9 Pet.) 224 (1835), the Court concluded that the title set up by Iowa did not depend upon a construction of any of these instruments unless it could be shown that its sovereign title was protected by them. 187 U.S. at 91-93. The Court found that both *DeArmas* and *Rood* ". . . involved no principle upon which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States, and that 'it would also comprehend all controversies concerning titles in any of the new States, since they are admitted into the Union by laws expressed in similar language.'" *Id.* at 93. Thus, *Iowa v. Rood* stands for the proposition that a claim based on sovereign title does not involve a federal question either arising under the equal-footing clause of a congressional Act of Admission or arising under the Constitution or a treaty of cession.

4. The Submerged Lands Act Did Not Convert Purely Local Title Questions Into Questions of Federal Law

As in *Bonelli*, the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, does not furnish an independent basis for appellate jurisdiction. "The legislative history of the Act indicates that it was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways." 414 U.S. at 324, n. 19.

B. This Case Does Not Properly Arise Under the Federal Common Law

1. In This Case, the Court Is Not Called Upon to Construe the Terms of a Federal Land Grant

Although this Court in *Bonelli* likened the creation of sovereign title upon admission to statehood to a "grant" (414 U.S. at 323), the preceding section of this brief has demonstrated that title to the lands beneath navigable waters vested in the States as an incident of sovereignty and thus gave the States not only complete title to these lands but also the sovereign right to resolve questions affecting them under state law. The theory behind the application of federal common law to resolve questions relating to federal land patents clearly demonstrates how inappropriate it is to apply federal common law to local disputes between a state and riparian owners. In *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935), the Court stated:

> ". . . the question as to the extent of [a] federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect

of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." (Brackets added.)

The obvious justification of this rule is that federal law is needed to protect the federal rights of the grantee holding under a federal patent. If state rules of construction were applied to the scope of the patent, the grantee might be accorded property rights of less scope than he had been promised by the federal government. The continuing supervision of the federal common law with respect to federal patents is thus protective of a clear federal interest in seeing that federal acts are accorded full force and effect. On the other hand, federal supervision is not needed to protect the title to submerged land which vested in the States as an incident of sovereignty. As a sovereign, a State has its own courts and its own rules of property to protect its title. If the state courts fail to protect the sovereign title vested in the State, the State is free to change its constitution and laws under its own legislative process. The only qualification is that the State's rules must not violate due process or any other federal guarantee protecting private landowners who have conflicting title claims.

2. This Case Does Not Involve Any Other Federal Interest Justifying the Application of Federal Law

When it is recognized that a State does not need the protection of federal common law in the way that a federal grantee does, there no longer exists any federal interest to impel the creation of special federal rules of property for cases like *Bonelli* and

the case at bar. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), established that the federal courts do not possess the power to develop a body of general federal common law. *Erie* did not, however, preclude the development of specialized federal common law in appropriate circumstances. The ability to create and to declare what is the federal law is essential to the effective implementation of federal legislation. Mishkin, *The Variousness of "Federal Law": Competence in Discretion in the Choice of National and State Rules for Decisions*, 105 U. Penn. L. Rev. 797, 799 (1957). Since *Bonelli* and the present case involve no federal statutes, this basis for creating federal common law does not exist.

Federal law must also govern property disputes between the States and the federal government when national sovereignty is at issue. Such a case was *United States v. Maine*, 420 U.S. 515 (1975), where this Court found the United States to have sovereign rights in the seabed and subsoil of the Continental Shelf seaward of the three-mile limit. Likewise, in interstate boundary disputes, this Court must fashion federal common law to govern such controversies. *See e.g., Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 669-71 (1931). In such interstate disputes, the application of state law would be unworkable since the absence of a federal rule would leave the Court without any basis for applying one State's law in preference to another's.

None of the foregoing special situations is presented in the instant case which involves a local dispute between the State of Oregon and a sand and gravel

company over title to an intrastate section of the Willamette River. If federal common law governs this dispute, the federal interest must be found elsewhere. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), Mr. Justice Douglas wrote for the Court that "It is not uncommon for federal courts to fashion federal law when federal rights are involved." The logical converse of this precept is that the federal courts lack the power to fashion federal law where no federal right or interest is involved. The intrastate title dispute presented here is most assuredly such a case.

In *United States v. Yazell*, 382 U.S. 341, 352 (1966), this Court has said that state rules should be overridden by federal courts applying federal common law "only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." There is no national interest that requires the protection of a specialized common law rule. At present, "[t]he great body of law in this country which controls acquisition, transmission and transfer of property and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). It would be strange indeed if, in the intervening years since *Erie*, a federal interest in purely local land title disputes had emerged in a field

which even the strongest proponents of a general federal common law had left exclusively to the States.

Not only is there no federal interest to be protected by formulating federal common law rules for intrastate title disputes, but the application of such rules could be cruelly antithetical to very important federal interests. Congestion in the lower federal courts is a problem of national concern. *See, e.g.*, Burger, *Yearend Report*, 62 A.B.A.J. 189 (Feb. 1976); H. Friendly, *Federal Jurisdiction: A General View*, 19-54 (1973). Proposals have been put forward to abolish three-judge courts and to curtail diversity jurisdiction in order to alleviate the problem to some degree. It will be anomalous to cut back jurisdiction in these areas and to expand it simultaneously by making federal cases out of title disputes that more properly should be the exclusive concern of state courts. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101 (1972), this Court clearly established that cases arising under the federal common law are actions arising under the "laws" of the United States within the meaning of 28 U.S.C. § 1331(a). This holding means that all cases arising under any federal common law rules that may have been created pursuant to *Bonelli Cattle Co. v. Arizona, supra*, would be cases within the original jurisdiction of the federal district courts. Even if they are filed in state court, the defendants may have the right to remove them to federal court under the general removal statute because they could have been brought there in the first instance. 28 U.S.C. § 1441.

The ultimate scope of the new federal question jurisdiction which may have been created by *Bonelli* is potentially enormous. It has a finite limit when

one realizes that there are only 69,614 square miles of inland waterways and 66,769 miles of tidal shoreline which can give rise to litigation. But the lands involved are always changing due to the natural processes of accretion, erosion, and reliction. In addition, every year the spring rains bring floods causing changes in the courses of rivers. Reclamation, dredging and flood control projects all produce title changes. Once these cases give rise to litigation, the proceedings are usually time-consuming and complex. Adding to the burden of the federal courts is the fact that these cases in no way call upon the special expertise of federal judges in deciding questions of federal right. Absent any identifiable federal interest in fashioning federal common law to govern intrastate title controversies, the additional burden created for the federal courts should weight the scales against finding federal questions in this area where, prior to *Bonelli,* there once were none.

Another reason militating against the application of federal common law to cases like the one at bar is that there is no need for a uniform federal rule. The desirability of a federal rule may be plain in cases such as *Clearfield Trust Co. v. United States,* 318 U.S. 363, 367 (1943), where the application of state law: ". . . would subject the rights and duties of the United States to exceptional uncertainty" and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." Just the contrary is true in this case. All of the diverse state rules governing riparian

ownership may have to yield to this Court's view of the federal common law. For nearly two centuries, the States have been permitted to formulate a diversity of rules governing disputes as to the ownership of submerged lands and riparian properties. The variety of these different rules strongly suggests that unlike *Clearfield Trust,* the desirability of a uniform rule is not plain.

Throughout the history of the Union until *Bonelli* each State considered itself free to determine boundary and title disputes in and along its navigable waters. For that reason, each State has developed its own body of law governing navigable waters and conflicting rules arose in the various States. Different rules were established in determining the extent of a riparian owner's title. Some States held title extended only to the high water mark. *Mather v. State,* 200 N.W.2d 498 (Iowa, 1972). Other States held that title extended to the low water mark. *Cooly v. Golden,* 117 Mo. 33, 235 N.W. 100 (1892). Yet others held that title extended to the middle of a river. *Richardson v. Sims,* 118 Miss. 728, 80 So. 4 (1918). States have also differed in their disposition of land which is first totally submerged and then restored. Some States hold title vests in the new riparian. *Wemmer v. Young,* 167 Neb. 495, 93 N.W.2d 837, 848 (1958). Other States hold that title vests in the original riparian. *Perry v. Erling,* 132 N.W.2d 889, 897 (1965). While most States have held that artificially induced accretion inures to the benefit of the upland owner [*see* discussion in *State v. Sause,* 217 Or. 52, 342 P.2d 803, 821-

26 (1959)], the rule in other States is that title to such land is in the State. *United States v. Harrison County,* 399 F.2d 485, 491 (5th Cir. 1968, applying Mississippi Law), and *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 147 P.2d 964 (1944). These diverse state rules of property may have to yield if *Bonelli* were given the expansive interpretation that federal common law governs the respective rights of the States and the upland owner.

In view of the varying rules from State to State and the length of time over which this diversity has been tolerated, *amici* submit that this Court would have to find a federal interest of exceedingly great importance to justify displacement of all of these different State rules by a Procrustean federal common law approach. Such an approach is inconsistent with the general federal rule that whatever incidents or rights attached to the ownership of property conveyed by the federal government in its patents will be determined according to state law. *See, e.g., Packer v. Bird,* 137 U.S. 661, 669 (1891). If state law may properly govern the rights of federal patentees whose property borders on navigable streams, there is little sense in applying federal common law rules to decide local title questions where neither the State nor the private riparian owner traces its title to a federal grant.

Conclusion

Since the Equal-Footing Doctrine has no proper application to intrastate title and boundary disputes, *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), cannot be considered controlling precedent in this case. It was decided in the absence of a viable federal question conferring appellate jurisdiction on this Court. Intrastate

title disputes, such as those involved in *Bonelli* and the present case, are matters of local concern. Absent any overriding federal interests, they should be finally decided in the state courts under state law. Therefore, *amici* urge this Court to reconsider *Bonelli Cattle Co. v. Arizona* and to return this case to the Oregon Supreme Court relieved of that precedent for a new decision under Oregon law.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

SANFORD N. GRUSKIN,
Chief Assistant Attorney General—Special Operations Division,

N. GREGORY TAYLOR,
Assistant Attorney General,

RUSSELL IUNGERICH,
JEROLD A. KRIEGER,
Deputy Attorneys General,

WILLIAM J. BAXLEY,
Attorney General of the State of Alabama,

AVRUM GROSS,
Attorney General of the State of Alaska,

ROBERT L. SHEVIN,
Attorney General of the State of Florida,

ARTHUR K. BOLTON,
Attorney General of the State of Georgia,

(Continued on next page)

RONALD AMEMIYA,
Attorney General of the State of Hawaii,

WAYNE L. KIDWELL,
Attorney General of the State of Idaho,

THEODORE L. SENDAK,
Attorney General of the State of Indiana,

RICHARD C. TURNER,
Attorney General of the State of Iowa,

WILLIAM J. GUSTE, JR.,
Attorney General of the State of Louisiana,

FRANCIS B. BURCH,
Attorney General of the State of Maryland,

WARREN R. SPANNAUS,
Attorney General of the State of Minnesota,

A. F. SUMMER,
Attorney General of the State of Mississippi,

ROBERT L. WOODAHL,
Attorney General of the State of Montana,

PAUL L. DOUGLAS,
Attorney General of the State of Nebraska,

ROBERT LIST,
Attorney General of the State of Nevada,

WILLIAM F. HYLAND,
Attorney General of the State of New Jersey,

ALLEN I. OLSON,
Attorney General of the State of North Dakota,

DANIEL R. MCLEOD,
Attorney General of the State of South Carolina,

WILLIAM JANKLOW,
Attorney General of the State of South Dakota,

JOHN L. HILL,
Attorney General of the State of Texas,

ANDREW P. MILLER,
Attorney General of the Commonwealth of Virginia,

CHAUNCEY H. BROWNING, JR.,
Attorney General of the State of West Virginia,

Attorneys for Amici Curiae.

Supreme Court, U. S.
FILED
MAR 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF OF STATE OF WASHINGTON, AMICUS CURIAE

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

March, 1976

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF OF STATE OF WASHINGTON, AMICUS CURIAE

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

March, 1976

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF OF STATE OF WASHINGTON, AMICUS CURIAE

STATEMENT OF INTEREST ON QUESTIONS PRESENTED

Pursuant to Rules 40(4) and 42(5), the State of Washington replies to the two questions framed by Corvallis Sand and Gravel Company:[1]

---

[1]The Court granted petitions for certiorari filed by the State of Oregon and the Corvallis Sand and Gravel Company on January 12, 1976. Both petitions were consolidated for hearing. Our opening brief was, therefore, directed solely to the question presented by

"Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover possession of the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no allegation pleaded and no proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by defendant Corvallis Sand and Gravel Company?"

"Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover damages for the removal of sand and gravel from the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no pleaded allegation or proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by the defendant Corvallis Sand and Gravel Company?"[2]

We are filing this reply brief to address arguments made by Corvallis to which we yet have not had the opportunity to respond. Washington's deep-seated interest in this case has been stated.[3] Our present concern is limited to the possible imposition of the rationale of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) upon Washington's law which does not recognize "riparian" rights.

ARGUMENT

A. The Equal Footing doctrine comprehends the beds of fresh water navigable streams.

Oregon's petition. We indicated that a separate brief would be filed on the questions presented by Corvallis in Cause No. 57-577 in accordance with the briefing schedule set by the Clerk. (Brief Amicus Curiae of the State of Washington, p. 2, ft.nt. 2)

[2]Petition For A Writ of Certiorari filed by Corvallis Sand and Gravel Company, Docket No. 75-577, pp. 2-3.

[3]Washington Brief, *amicus curiae*, pp. 1-7 and Appendix A.

Corvallis asserts that a state's proprietary interest is limited to the beds of tidal waters and does not encompass the beds of fresh water navigable streams.[4] This contention has been fully answered on a number of occasions by the Court. A recent decision is illustrative. *Texas v. Louisiana*, 410 U.S. 702, 713 (1973) states:

> "It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. (Citing Cases)"

Earlier decisions of similar import are *Shively v. Bowlby*, 152 U.S. 1 (1894); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); and *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212, 227-229 (1845).

The foregoing cases are, of course, merely illustrative and not exhaustive. Many more could be cited. The point is simply that the beds of fresh water navigable streams were not granted by the Constitution to the United States nor to a riparian owner. Such aquatic lands were reserved to the original 13 states which formed the Union and to subsequently admitted states formed out of territory held by the United States. The principle fully applies in this case.[5]

[4]Corvallis Opening Brief, pp. 5-6, 15-25.

[5]Corvallis apparently concedes that this principle is firmly imbedded in our Constitutional firmament. At page 44 of their opening brief, the following statement appears:

"For two centuries state courts, *with the approval of this* [C]*ourt*, have in many jurisdictions retroactively severed from the riparian the rights of property which are properly his." (Emphasis Supplied)

Washington submits that such a radical disruption of well-settled law as contended by Corvallis is not justified. Moreover, such questions are left to the states to resolve. *Iowa v. Rood*, 187 U. S. 87, 93 (1902).

B. **A new federal common law test of determining a state's title to aquatic lands beneath navigable waters should not be adopted.**

As we pointed out in our opening brief (pp. 7-14), the paramount issue involves whether a federal question is presented in this case. Without abandoning our reasoning that no federal question exists, we submit that the newly fashioned federal common law test of state ownership of aquatic lands is predicated upon erroneous premises. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 323, ft.nt. 15 (1973).

Corvallis contends that there is a need to devise a uniform rule superseding the variety of state law methods of resolving this sort of title dispute. (Corvallis Opening Brief, pp. 34-35). A perceived "need for uniformity" ought to be based upon a well-defined federal right.[6] Under the facts of this case, we submit that no federal right exists. Corvallis has not identified such a claimed federal right.[7]

Ancillary to the foregoing proposition is the notion that the *Bonelli* formulation fits the non-riparian status of Washington. We submit that it does not. The Court has recognized Washington's unique status among the states in *Port of Seattle v. Oregon & Wash. Ry. Co.*, 255 U.S. 56, 64 (1921):

> "Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of up-

[6]See: *Miskin, The Variousness of 'Federal Law': Competence in Discretion in the Choice of National and State Rules for Decisions*, 105 U. Penn. L. Rev. 797 (1957).

[7]The brief of California and the other states, *amici curiae*, pp. 26-32, presents cogent arguments against the adoption of a uniform federal rule. Washington concurs with the views of our sister states.

> lands abutting upon a natural navigable waterway grants no right of any kind either in land below high water mark, *Eisenbach v. Hatfield*, 2 Washington, 236; or in, to, or over the water.
> * * *
> "So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. (Citing Cases)"[8]

The absence of riparian rights in Washington does not square with the rationale of *Bonelli* (p. 326, 328, 329) that a diminishment in the quality of a riparian's estate by river movement or the possible imposition of a noncompensable loss of riparian character of the uplands *requires* the fashioning of a new equitable rule to establish title. Under Washington law, there is no "quality of being *riparian*." (*Bonelli*, p. 326) *Port of Seattle, supra*, should be dealt with if the Court opts for continued adherence to the *Bonelli* rule. There is nothing left to analyze in terms of balancing an upland owner's nonexistent riparian right (under Washington law) against the "limited nature of the sovereign's rights in the riverbed." (*Bonelli*, p. 328). Even a "limited" right out-

[8]The law in Washington consistently has been non-recognition of riparian rights, e.g., *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946); *Harris v. Hylebos Indus. Inc.*, 81 Wn.2d 770, 773-776, 505 P.2d 457 (1973).

Since admission into the Union, Washington has treated its submerged and adjacent shorelands in accordance with the non-riparian doctrine. Sales, leases and management of such aquatic lands have been predicated upon the assumed validity of the absence of riparian rights appurtenant to abutting uplands since 1889.

weighs a nonexistent right under the balancing approach mandated by *Bonelli.*

CONCLUSION

As demonstrated in our opening brief, there is no federal question presented under the facts of this case.

Alternatively, we submit that the rationale stated by the Court in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973) does not take into account Washington's unique status as a non-riparian state. At the minimum, Washington's long-standing and uniform application of its laws should not, by implication, be destroyed by an uncritical extension of *Bonelli* into this domain.

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General
Attorneys for Amicus Curiae
State of Washington

March, 1976

Supreme Court, U. S.
FILED
APR 8 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 75-567 and No. 75-577 (Consolidated)
OCTOBER TERM, 1975

State of Oregon, Acting by and
through the State Land Board,
Petitioner and Respondent,
v.
Corvallis Sand and Gravel Company,
an Oregon corporation,
Respondent and Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF OF UTAH AND NEW MEXICO AS AMICI CURIAE

TONEY ANAYA
Attorney General of New Mexico

PAUL L. BLOOM
Assistant Attorney General
of New Mexico

Department of Justice
Supreme Court Building
Santa Fe, New Mexico 87503

VERNON B. ROMNEY
Attorney General of Utah

ROBERT B. HANSEN
Deputy Attorney General
of Utah

DALLIN W. JENSEN
Assistant Attorney General
of Utah

RICHARD L. DEWSNUP
Special Assistant Attorney
General of Utah

236 State Capitol Building
Salt Lake City, Utah 84114

April 9, 1976

TABLE OF CONTENTS

	Page
I. PREFACE	1
A. The Issue	1
B. Position of Utah and New Mexico	2
C. Differing Positions of Amici and Oregon	5
1. Oregon's Position Distinguished	5
2. California's Position Distinguished	9
D. Refinement of the Issue as Perceived in this Brief	12
II. SUMMARY OF ARGUMENT: REASONS WHY HUGHES AND BONELLI SHOULD BE OVERRULED	13
A. Hughes and Bonelli Represent a Departure from Prior Decisions	13
B. Hughes and Bonelli Presented No Federal Question	14
C. Submerged Lands Act Confirmed and Established State Ownership	16
D. State Law Required by Submerged Lands Act	17
E. State Law Required by Judiciary Act	19
F. State Law Required as Constitutional Necessity	19
G. Equal Footing Requires State Law	20
H. State Law Required to Protect Vested Rights of States	23

Page

I. State Law Required to Protect Vested Private Rights 23

J. State Law Required to Protect Public Interest and Public Trust 24

K. State Law Required to Avoid Clouds on Real Estate Titles 26

L. Federal Law Protects No Private Interests 27

M. Federal Law Would be All-Pervasive 27

N. Federal Law Would Burden the Federal Judiciary 28

O. Bonelli's "Public Interest" Criteria are Impractical 29

P. Federal Law Would Protect No Federal Interest 30

Q. Federal Law is Inapplicable in Appropriation States 31

R. States' Rights in Beds and Shores of Navigable Waters Do Not Derive from Federal "Grants" 31

III. NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE EQUAL FOOTING DOCTRINE 34

A. Law of England 34

B. The Original States 34

C. Navigable Waters Defined 36

D. Non-Navigable Waters 40

Page

E. State Ownership as Integral Part of Public Trust 41

IV. NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE SUBMERGED LANDS ACT 42

A. Preface 42

B. Judicial History of Submerged Lands Act 46

C. Legislative History of Submerged Lands Act 50

D. Language of the Submerged Lands Act 64

V. STATE LAW REQUIRED BY JUDICIAL DECISIONS 65

A. Preface 65

B. Chronological Examination of Major Cases Prior to 1967 68

1. 1876: Barney v. Keokuk 69

2. 1894: Shively v. Bowlby 72

3. 1897: St. Anthony v. St. Paul 77

4. 1905: Joy v. City of St. Louis 88

5. 1918: Arkansas v. Tennessee 91

6. 1926: United States v. Holt State Bank 91

C. Federal Law Particularly Unsuited for Appropriation States 95

1. Preface 95

Page

2. Birth of the Appropriation System 96

3. Congressional Approval of Appropriation System 98

4. Supreme Court Clarification and Confirmation 101

VI. STATE LAW REQUIRED BY FEDERAL STATUTES 102

A. The Submerged Lands Act 103

B. The Judiciary Act 104

VII. STATE LAW REQUIRED AS A CONSTITUTIONAL NECESSITY 106

VIII. THE FIRST DEPARTURE: HUGHES v. WASHINGTON IN 1967 115

A. Preface 115

B. Borax v. Los Angeles in 1935 115

C. Prelude to Hughes: U.S. v. Washington in 1961 120

D. The Hughes v. Washington Decision in 1967 123

IX. THE SECOND DEPARTURE: BONELLI v. ARIZONA IN 1973 128

X. CONCLUSION 132

CERTIFICATE OF SERVICE 137

Page

AUTHORITIES CITED

I. CASES:

Alabama v. Georgia, 23 How. 505 (1859) 6, 7

Arkansas v. Tennessee, 246 U.S. 158 (1918) 91, 130

Barney v. Keokuk,
94 U.S. 324 (1876) 36, 38, 69, 70, 72, 81, 130

Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) .. 111

Blackburn v. Portland Gold Mining Company,
175 U.S. 571 (1900) 109, 122

Bonelli Cattle Co. v. Arizona,
414 U.S. 313 (1973) 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 44, 79, 88, 94, 95, 128, 129, 132, 133, 134, 135

Borax Consolidated Ltd. v. City of Los Angeles,
296 U.S. 10 (1935) 6, 115, 116, 119, 120, 123, 124, 125, 126, 127, 130

Borax Consolidated Ltd. v. City of Los Angeles,
20 F.Supp. 69 (S.D. Cal. 1937);
aff'd, 102 F.2d 52 (9th Circ. 1939);
cert. denied, 307 U.S. 644 (1939) 120

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 31, 101, 102

Coffin v. Left Hand Ditch Co.,
6 Colo. 443 (1882) 99

Colorado Central Mining Co. v. Turck,
150 U.S. 138 (1893) 109

Cook v. Evans, 45 S.D. 31,
185 N.W. 262 (1921) 101, 102

Page

Erie v. Tomkins,
304 U.S. 64 (1938) 19, 20, 105, 106, 111, 112, 113, 114, 115, 135

Fidelity Union Trust Co. v. Field,
311 U.S. 169 (1940) 114

Florida Central & P. Railroad Co. v. Bell,
176 U.S. 321 (1900) 109

Gold-Washing and Water Co. v. Keyes,
96 U.S. 199 (1877) 109

Goodtitle v. Kibbe, 9 How. 471 (1850) 81

Guaranty Trust Co. v. York,
326 U.S. 99 (1945) 114

Gully v. First National Bank in Meridian,
299 U.S. 109 (1936) 109

Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 Pac. 852 (1918) 98

Gutierres v. Albuquerque Land and Irrig. Co.,
188 U.S. 545 (1903) 101

Hardin v. Jordan, 140 U.S. 371 (1891) 84

Hough v. Porter, 51 Ore. 318,
98 Pac. 1083 (1909) 101

Hughes v. State of Washington,
389 U.S. 290 (1967) 3, 4, 5, 8, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 79, 88, 94, 95, 115, 116, 119, 120, 123, 124, 125, 126, 127, 128, 129, 132, 133, 134, 135

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892) 34

Iowa v. Rood, 187 U.S. 87 (1902) 15

Irwin v .Phillips, 5 Cal. 140 (1855) 98, 99

Page

Johnson v. O'Neill, 105 Law Times Rpt.
587 (House of Lords, 1911) 37, 41

Joy v. City of St. Louis,
201 U.S. 332 (1906) 88, 91, 122, 125, 133

Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co., 142 U.S. 254 (1891) .. 85

Martin v. Waddell, 16 Pet. 367 (1842) 35, 79

McGilvra v. Ross,
215 U.S. 70 (1909) 15, 75, 77, 122

McStay v. Friedman, 92 U.S. 723 (1875) 109

Oregon v. Corvallis Sand & Gravel Co.,
272 Ore. 545, 536 P.2d 517 (1975) 2

Packer v. Bird, 137 U.S. 661 (1891) 83

Platt v. Rapid City,
67 S. Dak. 245, 291 N.W. 600 (1940) 102

Pollard v. Hagan, 3 How. 212 (1845) 36, 80

Romie v. Casanova, 91 U.S. 379 (1875) 108

Ruhlin v. New York Life Ins. Co.,
204 U.S. 202 (1938) 114

St. Anthony Falls Water and Power Company v. St. Paul Water Commissioners,
168 U.S. 349 (1897) 77, 79, 87, 88, 124

St. Louis v. Myers, 113 U.S. 566 (1885) 82

St. Louis v. Rutz, 138 U.S. 226 (1891) 85

San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922) .. 101

Scott v. Lattig, 227 U.S. 229 (1913) 130

Shively v. Bowlby,
152 U.S. 1 (1894) 14, 15, 32, 34, 41, 72, 73, 75, 76, 86, 96, 130, 136

Page

Shoshone Mining Co. v. Rutter,
177 U.S. 505 (1900) 109

Shulthis v. McDougal,
225 U.S. 561 (1912) 14, 15, 16, 108

Six Companies v. Joing Highway District No. 13,
311 U.S. 180 (1940) 114

Smith v. Maryland, 18 How. 71 (1855) 42

Still v. Palouse Irrigation & Power Co.,
64 Wash. 606, 117 Pac. 466 (1911) 101

Stoner v. New York Life Ins. Co.,
311 U.S. 464 (1940) 114

Swift v. Tyson,
16 Pet. 1 (1842) 19, 20, 104, 105, 110, 111, 113, 115, 135

The Daniel Ball,
10 Wall. 557 (1870) 18, 38, 39, 70

The Montello, 20 Wall. 430 (1874) 40

The Propeller Genessee Chief v. Fitzhugh,
12 How. 443 (1851) 36, 37, 70

The Robert W. Parson, 191 U.S. 17 (1903) 40

The Thomas Jefferson, 10 Wheat. 428 (1825) 37, 69

United States v .California,
332 U.S. 19 (1947) 46, 47, 49, 50, 52, 54

United States v. Holt State Bank,
294 F. 161 (8th Circ. 1923) 92, 93

United States v. Holt State Bank,
270 U.S. 49 (1926) 30, 36, 67, 91, 93, 122

United States v. Little Lake Misere Land Co.,
412 U.S. 580 (1973) 20, 114

United States v. Louisiana,
339 U.S. 699 (1950) 46, 47, 54

Page

United States v. Maine, 420 U.S. 515 (1975) 46

United States v. Oregon,
295 U.S. 1 (1934) 49, 66, 125

United States v. Texas,
339 U.S. 707 (1950) 21, 46, 47, 48, 49, 54

United States v. Utah,
283 U.S. 64 (1931) 36, 40

United States v. Washington,
294 F.2d 830 (9th Circ. 1961); *cert. denied*, 369 U.S. 518 (1962) 120, 123, 125, 128

Utah v. United States, No. 31, Original 8

Utah v. United States, 403 U.S. 9 (1971) 36, 44

Utah v. United States, 406 U.S. 484 (1972) 45

Utah v. United States, 420 U.S. 304 (1975) 8

Vandenbark v. Owens-Illinois Glass Co.,
311 U.S. 538 (1941) 114

West v. American Tel. & Tel. Co.,
311 U.S. 223 (1940) 114

Wilcox v. Jackson, 38 U.S. 498 (1839) 67, 116

II. CONSTITUTION, STATUTES AND TREATIES:

United States Constitution, art I, §8 35

United States Constitution, art. III, §2 107

28 United States Code 725 ....104, 110

28 United States Code 1652
(Judiciary Act) 19, 20

43 United States Code 851 *et seq.* 32

Page

43 United States Code 1301 *et seq.* (Submerged Lands Act) 6, 10, 15, 16, 17, 18, 33, 43, 45, 46, 49, 50, 55, 58, 62, 63, 64, 65, 103

9 Stat. 453 98

14 Stat. 251, 253, 1866, as amended, 43 U.S.C. 661 100

16 Stat. 217, 218, 1870, as amended, 43 U.S.C. 661 100

19 Stat. 377, 1877, as amended, 43 U.S.C. 321 100

62 Stat. 944, 28 U.S.C. 1652 106

Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922 ..... 96, 109

III. TEXTS AND TREATISES:

Areas of the United States, 1940, 16th Census of the United States, Government Printing Office, 1942 ..... 61, 62

Brough, Irrigation in Utah, John Hopkins Press, 1899 97

Hall, R., Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, 106-08 (2d ed. 1875) 34

Hutchins, Mutual Irrigation Companies in Utah, pp. 9-16 (1927) 98

Hutchins and Jensen, The Utah Law of Water Rights, p. 1 (1965) 96

Kinney, A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. 4, §§2055-59 (1912) 98

Public Access Rights in Waters and Shorelands, National Water Commission Publication PB-205-247, pp. 17 *et seq.* (July 1, 1971) 45

Page

Shearer, Federal Land Grants to the States: An Advocate's Dream; a Title Examiner's Nightmare, 14 Rocky Mountain Mineral Law Institute, 193-94 (1968) 26, 27

Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. Law Rev. 49 (1928) 113

Water Policies for the Future, Final Report of the National Water Commission, at p. 275 (1973) 45

Weil, Water Rights in the Western States, vol. 1, p. 832 *et seq.* (3d ed. 1911) 41

IV. MISCELLANEOUS:

1953 U.S. Code Cong. and Adm. News, 1531, *et seq.* 56, 57, 58, 60, 61

Cong. Record, July 24, 1951—Senate Vol. 97, Part 7, 82nd Cong., 1st Sess. 60

Senate Joint Resolution 13, 83rd Cong., 1st Sess. (1953) 58

Senate Joint Resolution 20, 82nd Cong., 2nd Sess. (1952) 54

Senate Report No. 133, Part 2, 83rd Cong., 1st Sess., 1953 ..... 53, 55, 59, 60, 63

House Document No. 765, 79th Cong., 2d Sess. (1946) 53

House Joint Resolution 225, 79th Cong., 2d Sess. (1946) 52

House Report 215, 83rd Cong., 1st Sess. (1953) 60

House Resolution 4198, 83rd Cong., 1st Sess. (1953) 58

In the Supreme Court of the United States

No. 75-567 and No. 75-577 (Consolidated)

OCTOBER TERM, 1975

State of Oregon, Acting by and
through the State Land Board,
Petitioner and Respondent,

v.

Corvallis Sand and Gravel Company,
an Oregon corporation,
Respondent and Petitioner.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OREGON

BRIEF OF UTAH AND NEW MEXICO AS AMICI CURIAE

I. PREFACE

A. *The Issue*

Near Corvallis, Oregon, the Willamette River separates into two channels for a short distance, and these two channels then join again to form a single channel. At an earlier time, the right-hand fork carried the primary flow of the stream, but the left-hand fork then be-

gan to carry a heavier flow, until, at present, the left-hand fork carries virtually the entire flow.

The Willamette River is navigable, and Oregon at statehood thus acquired title to the bed and shores up to the ordinary high water mark of the River. A private corporation, claiming riparian rights, has removed sand and gravel from the left-hand fork. The State of Oregon sought ejectment and damages.

The decision of the Oregon Supreme Court, 272 Or. 545, 536 P.2d 517 (1975), which was brought before this Court for review, addressed difficult concepts of real property law as they relate to riparian rights and the respective ownership claims of the parties to eleven separate parcels of submerged and adjacent lands.

Two basic questions are now before this Court: (1) are the ownership claims to be resolved by the law of Oregon or by federal decisional law; and (2) if by federal decisional law, what are the respective rights of the parties to the bed and shorelands of the Willamette River?

Utah and New Mexico, as the present *amici curiae*, are concerned only with the first question, and have confined this brief to that issue.

B. *Position of Utah and New Mexico*

Utah and New Mexico respectfully request the Court to declare that the present dispute must be con-

trolled and resolved by the law of Oregon, and not by federal decisional law. To the extent that *Hughes v. State of Washington*, 389 U.S. 290 (1967), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), must be overruled, it is respectfully requested that they be overruled.

Hughes involved a "dry sand" area of the beach along the Pacific Ocean, which was claimed by the State of Washington as part of the tidelands which it received at statehood by virtue of the equal footing doctrine, and by Mrs. Hughes as a private upland owner by virtue of the riparian rights doctrine of accretion. The Washington Supreme Court held that state law controlled, and that under state law the boundary separating state-owned tidelands and privately-owned uplands became fixed and permanent at statehood, and that state-owned tidelands thus were not subject to divestment by the common law doctrine of accretion. This Court reversed, holding that a federal question was present by virtue of the fact that a predecessor-in-interest of Mrs. Hughes had obtained the land by patent from the United States, and that it was necessary to construe the effect of the patent to ascertain whether it carried with it any attributes of riparian rights. The Court held that it did, and that the riparian rights doctrine of accretion must be applied as a matter of federal decisional law to divest the State of Washington of its title to the disputed area of the beach.

Bonelli involved a tract of land near the Colorado River in Arizona, claimed by Arizona as a part of the bed of the River received at statehood by virtue of the

equal footing doctrine, and by a private upland owner under riparian theories of accretion and reliction. It was undisputed that the land had earlier been a part of the riverbed, but the regulated flow of the River which resulted from the subsequent construction of Hoover Dam and the impoundment of waters in Lake Mead, and the effect of a relatively recent re-channelization of the River, left the tract in question high and dry. The Arizona Supreme Court held that state law applied, and that under state rules of property law neither accretion nor reliction could apply to divest the State of its title. This Court reversed, holding that the title which States receive to the beds of navigable waters at statehood by virtue of the equal footing doctrine is a defeasible title, and that Arizona had been divested of its title by virtue of the federal common law doctrine of accretion as expressed in *Hughes*.

It will be noted that *Hughes* and *Bonelli* arrive at exactly the same result even though they employ entirely different reasons for applying federal decisional law to displace local rules of property law. *Hughes* found a federal question by construing the legal meaning and effect of a federal patent issued under authority of laws enacted by Congress; however, Bonelli relied not at all on the derivation of title theory, even though it could have done so. *Bonelli* simply defined the equal footing doctrine in such a way as to make state ownership of the beds and shores of navigable waters subject to divestment through common law doctrines of riparian rights as defined and invoked as a part of federal common (decisional) law.

Utah and New Mexico are firmly convinced that both *Hughes* and *Bonelli* are in direct and irreconcilable conflict with the position embraced by this Court and expressed in dozens of its decisions from the founding of the Republic until the *Hughes* decision in 1967. It is also believed that there are many valid reasons of law and public policy why *Hughes* and *Bonelli* must now be overruled, and no sound reasons why they should not.

In short, Utah and New Mexico believe that the law of Oregon should govern the merits of the ownership dispute, and consequently express no view as to how the merits should be decided.

C. *Differing Positions of Amici and Oregon*

Utah and New Mexico, as the present *amici curiae*, are in general sympathy with the State of Oregon and in general agreement with the State of California, *et al.*, *amici curiae*. However, there are important differences, and they must be noted.

1. *Oregon's Position Distinguished*

Oregon requests the Court to "modify" the *Bonelli* case, as explained at pp. 18-19 of Oregon's brief dated February, 1976, in No. 75-567:

> The clearest solution to the problem pointed out above would, in other than boundary cases, be to make the state's sovereignty and ownership of its navigable watercourses follow the river independent of the character of the changes in the

river as sudden or imperceptible. *See State v. R. E. Janes Gravel Co.*, 175 S.W.2d 739, 741-742 (Tex. Civ. App. 1943). To adopt such a rule, however, this Court would have to modify in part the *Bonelli* rule that the state's "title to the bed of a navigable river mechanically follows the river's *gradual* changes in course." *Bonelli, supra,* 414 U.S. at 318 (emphasis supplied). The modification would be that the public's title to the riverbed (in other than boundary situations between states) would, irrespective of whether a change in the river was gradual or sudden, mechanically follow the river in its various movements. The State of Oregon would deem this a very desirable result, because it would produce certainty in the law, would terminate the need for much litigation and would quiet title to navigable riverbeds in favor of the public interest. (Emphasis appears in Oregon's brief).

Perhaps such a rule of law would be workable for the State of Oregon, but, in the view of Utah and New Mexico, it would be extremely unwise and confusing if proclaimed by this Court as a rule of federal law. Actual currents and water levels do not represent legal boundaries. On tidal waters, the boundary is the average of the high tides (*Borax Consolidated Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935)), and on inland navigable waters the boundary is the ordinary high water mark (*Alabama v. Georgia,* 23 How. 505 (1859); and see 43 U.S.C. 1301(a)).

Thus, boundaries on inland navigable waters do not move or change with the changes in elevations, levels or flows of the watercourses. Those boundaries change only when, through gradual and imperceptible

processes, the watercourse assumes a new, different and permanent stage or range of fluctuations. In such an event, a new "ordinary high water mark" will form at the new stage, and the boundary of the watercourse changes accordingly. Under common law principles, as adopted and followed in many of the States, such boundary changes can result only from erosion (a washing away of the bank or shore), accretion (gradual deposits of sediments on the bank or shore until it is permanently above the ordinary high water level), or reliction (gradual lowering of the watercourse to expose part of the bed as permanently dry upland). There are no other forces or processes recognized by the common law of the States (nor in any federal decisions, for that matter), which can result in a change in the boundary of a navigable water.

It is also important to note that the ordinary high water mark is rarely at the water's edge. It is located at an elevation that will contain the watercourse during all of its fluctuations during the entire period of an average year. Thus, the area within the ordinary high water mark will consist of the submerged bed and the adjacent shorelands up to the ordinary high water mark, unless it should happen that the actual water level at a particular moment was precisely at the ordinary high water mark. (*Alabama v. Georgia, supra,* at pp. 513 *et seq.*). The high water mark ordinarily is found as a physical mark on the ground, sometimes evidenced by a vegetation line which indicates the high water level reached by the watercourse during a substantial period of the average year, and sometimes (particularly with respect to lakes) evidenced by a wave-action erosion

line at the highest level reached by the water for a substantial period of the average year.

The only point of present relevance is that rules of property have been developed and applied in every State to govern the location of boundaries of navigable waters. It would be confusing and disruptive in the extreme if the Court now were to announce a new rule which said that the actual current or level of the watercourse is the boundary. Utah and New Mexico do not propose any generally applicable rule, but, rather, urge the Court to announce no general rule, and to decide that the law of Oregon governs the dispute.[1] If the Court should do that, Oregon is free to apply its own local law, so long as no validly acquired, vested property rights are impaired or destroyed in the process, and other States would similarly apply their respective statutory or decisional rules.

---

[1] Neither Utah nor New Mexico is involved in any litigation that will be affected by the Court's resolution of the case at bar, and this brief is prompted by no motive other than a firm conviction that **Hughes** and **Bonelli** can result in no good and inevitably must do much harm if not overruled. Utah is still involved in the continuing controversy with the United States over the ownership of certain shorelands surrounding the Great Salt Lake, pending in this Court as **Utah v. United States, No. 31, Original.** The final phase of that case, now held under advisement by Special Master Charles Fahy, involves only a determination of the original boundary of the Great Salt Lake at the date of Utah's statehood. Both parties have conceded that this is a federal question. It might be noted, however, that in an earlier phase of that litigation the Special Master ruled that as a matter of federal law the doctrine of reliction did not apply to exposed shorelands surrounding the Great Salt Lake because of the unique physical characteristics of the Lake. This Court accepted and approved that report, and entered a decree in accordance therewith, more than a year after the **Bonelli** decision. **Utah v. United States, 420 U.S. 304 (1975).**

2. *California's Position Distinguished*

California and twenty-two other States have filed an *amici curiae* brief in this case (No. 75-567 and No. 75-577 Consolidated). Utah and New Mexico declined to join therein, and elected, rather, to file this brief. In so doing, it is emphasized that Utah and New Mexico support the substance of the arguments advanced by California, *et al.* Two distinctions, however, are noteworthy.

We disagree with California's belief that the *Bonelli* decision casts a cloud on state ownership of the beds and shores of inland navigable waters located within the ordinary high water mark. This concern is expressed, for example, on page 2 of California's brief:

> If federal common law controls this dispute, California and its sister States are concerned that their once absolute ownership of the lands beneath their navigable waters and lakes and their tidewaters may be reduced to nothing more than a navigational servitude.

California was concerned with the Court's reliance in *Bonelli* on the fact that Arizona had no public interests associated with navigation or other public purposes that justified denial of *Bonelli's* accretion claim .However, it must be remembered that the Court was considering only whether Arizona's "defeasible" title should be divested by application of the doctrine of accretion. Thus, the Court's emphasis on public interests and navigational needs related solely to whether, as a matter of federal decisional law, the state's "defeasible" title

should be diminished by declaring the high-and-dry land to be accretion land.

Further, *Bonelli's* characterization of Arizona's title as "defeasible" was clearly limited to potential divestment by common law principles of riparian law. That is, in the discretion of this Court federal decisional law could be applied to divest state title to shorelands under doctrines of accretion, reliction and erosion—but under no other doctrines, because riparian law recognizes no other changes in boundary.

This Court intimated nothing in *Bonelli* which could cast any cloud over state ownership of submerged lands *and* shorelands *within the ordinary high water mark*. In fact, the very purpose for applying the accretion doctrine in the *Bonelli* case was to move the boundary from the upland side of the permanently dry tract in dispute to the ordinary high water mark. There was no suggestion that Arizona did not continue to own the submerged bed and that part of the shore located between the water's edge and the ordinary high water mark. The very nature, purpose and function of the doctrine of accretion is to adjust the upland owner's boundary so that it always remains at the ordinary high water mark.

Moreover, in light of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, it is impossible to believe that this Court has or will put in question the absolute ownership of the States in and to the beds and shores of inland navigable waters up to the line of ordinary high water. Accordingly, even if this Court should reaffirm

the *Bonelli* holding, Utah and New Mexico believe that it is clear that state title is "defeasible" only by operation of the doctrines of reliction and accretion. As such, state title is defeasible only to the extent that the area located within the high water mark at statehood changes so that a new and different area is embraced by a new ordinary high water mark. If the change results from the physical processes of accretion or reliction, the defeasible title of the State is divested to that extent. Of course, if the change results from the process of erosion the State gains additional land, because erosion divests uplands, not state-owned beds or shorelands.

Of course, if this Court elects to fashion generally applicable federal rules of property law in the case at bar to resolve ownership claims to the submerged bed and the shorelands within the ordinary high water mark, then California's fears would be very well founded. The pertinent point is that neither *Hughes* nor *Bonelli* can serve as any precedent for applying federal law to resolve title disputes to lands located below the ordinary high water mark or the line of the average high tides.

Having said that, it is still important to emphasize that *Hughes* and *Bonelli* are wholly unsound, and that there are many compelling reasons why they should be overruled.

The second difference of significance between California's position and that taken by Utah and New Mexico is that California urges the Court to overrule only *Bonelli*, and makes no mention of *Hughes*. We believe, on the other hand, that *Hughes* is fraught with fully as

much mischief as *Bonelli*, and that both cases must be overruled.

D. *Refinement of the Issue as Perceived in this Brief*

It is the thesis of this brief that the Court should decide that it has no jurisdiction for want of a substantial federal question; and that, in so holding, the Court should expressly overrule both *Hughes* and *Bonelli*.

The issue, then, is simply whether federal or state rules of property law should control questions of accretion, reliction, erosion and avulsion. Federal rules of decisional law, if *Hughes* and *Bonelli* are an accurate guide, probably will be patterned after common law principles of riparian rights as developed in England and modified to some degree in the Eastern States. If there were a general and uniform law of riparian rights, then presumably state law and federal law would reach essentially the same results.

But there is no uniform law of riparian rights. Many of the Western States have never adopted any legal concepts of riparian rights, while other States have adopted some riparian principles and rejected others. In particular, many States have held that their ownership of the beds and shores of inland navigable waters to the line of ordinary high water as it existed at the date of statehood involves a fixed and permanent boundary that cannot be modified or changed by the common law doctrines of accretion and reliction. This was the status of the local law, for example, in both *Hughes* and *Bonelli*.

The question, then, is not necessarily one of determining whether a State has correctly applied a particular riparian doctrine, but, rather, whether the State is free not to incorporate such a doctrine at all in its rules of property law. Of course, the States cannot change rules of property law and give them retroactive effect, so as to divest private rights validly acquired and vested under the earlier rules, but it is suggested that there is no sound reason why a State should not be permitted to decide for itself what its local rules of property law shall be.

Until *Hughes* and *Bonelli* are overruled, the States will be denied that fundamental sovereign right.

II. *SUMMARY OF ARGUMENT: REASONS WHY HUGHES AND BONELLI SHOULD BE OVERRULED*

A. *Hughes and Bonelli Represent a Departure from Prior Decisions*

From the founding of the Republic until 1967 this Court had held that federal grants and patents did not carry with them any attributes of riparian rights, and that rules of property concerning riparian rights were to be devised and applied by the respective States. In 1967 *Hughes* departed from the long and unbroken line of earlier decisions, and held that land titles derived from federal grants raise federal questions to the extent necessary to determine riparian rights under federal decisional law.

In 1973 *Bonelli* followed the *Hughes* departure in all practical respects, but selected a different theoretical justification for the result. *Bonelli* actually re-defined and diminished the measure of state's rights in the shores of navigable waters by devising a new and different interpretation of constitutional "equal footing" among the States. *Bonelli*, like *Hughes*, indicated that the issue is a matter of first impression, whereas in fact numerous earlier decisions of this Court had made clear that state title to the beds and shores of navigable waters is not defeasible. Thus, both *Hughes* and *Bonelli* were serious and substantial departures from prior precedent, but neither case indicated any such departure. And neither case expressly sought to discredit any of the numerous prior cases to the contrary.

B. *Hughes and Bonelli Presented No Federal Question*

No federal question for purposes of jurisdiction was presented in either *Hughes* or *Bonelli*. *Hughes* could have presented a federal question with respect to the meaning and effect of federal land grants to determine whether they carry any attributes of riparian rights, *if* that question had not already been laid to rest. But *Shively v. Bowlby*, 152 U.S. 1 (1894), clearly said that federal grants and patents carry no attributes of riparian rights. And this Court had consistently refused to recognize any federal question merely by virtue of the fact that one of the parties derived his title from a federal grant or patent. As this Court said in *Shulthis v. McDougal*, 225 U.S. 561 (1912), in denying jurisdiction for want of a substantial federal question:

> This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. (225 U.S. at 569).

Bonelli is similar in the sense that this Court had repeatedly held in its prior decisions that state title to the beds and shores of navigable waters was not defeasible. Numerous efforts were made by riparian owners to make inroads on such state ownership through claims based on reliction and accretion. This Court steadfastly said that the state's title was not defeasible by such claims unless the law of the State so provided. Thus, in *McGilvra v. Ross*, 215 U.S. 70 (1909), this Court said that the question of riparian rights had raised a federal question prior to *Shively v. Bowlby, supra*, but that the *Shively* decision had definitively answered that question by saying that riparian rights in navigable waters and their shores must be defined by the laws of the respective States. Since the federal question had been answered, said this Court, there was no longer a question which could give federal jurisdiction. See also *Iowa v. Rood*, 187 U.S. 87 (1902).

The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, could have been the basis for a federal question in *Bonelli* if the claim of one of the parties had depended on the Court's construction of the statute:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not arise unless it

> really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912).

Even though Arizona based a claim on the Submerged Lands Act, that statute presents absolutely no basis for a determination that the States have a "defeasible" title to the beds and shores of their navigable waters. As noted below, the Submerged Lands Act had the opposite effect.

C. *Submerged Lands Act Confirmed and Established State Ownership*

Hughes paid no attention to the Submerged Lands Act, and *Bonelli* gave it short shrift. That Act expresses the clear congressional intent that the States have full and complete ownership of the beds of navigable waters and adjacent shorelands; Congress also expressly disclaimed any federal interest in favor of the States. That disclaimer included all natural resources in such lands and waters, and natural resources were defined to include, but were not to be limited to, all "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. 1301(e). *Bonelli* observed that the Submerged Lands Act did not convey anything to the States, although the United States Solicitor General made a persuasive argument to the contrary in 1972 (which apparently was accepted by this Court), as illustrated in Section IV of this brief.

D. *State Law Required by Submerged Lands Act*

It seems clear beyond doubt that the Submerged Land Act requires state law to control the present dispute (as well as the disputes before this Court in *Hughes* and *Bonelli*). Section 43 U.S.C. 1311(a) provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources *all in accordance with applicable State law* be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 [the date of this Court's decisions in the *Louisiana* and *Texas* cases], entitled thereto *under the law of the respective States in which the land is located* . . . (Emphasis added).

With respect to the boundaries of inland navigable waters, Section 43 U.S.C. 1301(a) provides that such waters are defined to include:

> . . . all lands within the boundaries of each of the respective States which are covered by nontidal waters that were *navigable under the laws of the United States* at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, *up to ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction* . . . (Emphasis added).

Nothing could be clearer. Congress provided that "the laws of the United States" would apply to determine whether the waters were navigable at the time that a State was admitted into the Union, and this was consistent with all of the decisions of this Court since the federal test of navigability was first established in *The Daniel Ball*, 10 Wall. 557 (1870). If the waters were navigable under the federal test, then the congressional grant recognized, confirmed, established and vested in and assigned all ownership interests to the "respective States or the persons . . . entitled thereto under the law of the respective States in which the land is located . . ." And, further, Congress specifically identified the boundary as the ordinary high water mark as modified by accretion, erosion or reliction.

Every aspect of the Submerged Lands Act was entirely consistent with the decisions of this Court as of May 22, 1953, when the law took effect. This Court had always applied federal law to determine navigability for purposes of state title under the equal footing doctrine, and had always required that riparian claims concerning reliction, accretion and erosion be determined under the laws of the respective States. In *Hughes* and *Bonelli*, however, this Court switched positions, but, in so doing, failed to note that Congress had clearly provided that state law must determine all such ownership disputes *after* it is determined under federal law that the waters were navigable at statehood, and that title had thus vested in the State under the equal footing doctrine.

E. *State Law Required by Judiciary Act*

Hughes and *Bonelli* also failed to note that the Judiciary Act, 28 U.S.C. 1652, requires the application of state law:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, *shall be regarded as rules of decision in civil actions in the courts of the United States*, in all cases where they apply. (Emphasis added).

This language might seem to be too broad and general for specific application to conflicts over titles to the beds and shores of navigable waters, but, as will be seen, this Court has specifically held that the above statute, as a constitutional necessity, requires local law to govern all land title disputes.

F. *State Law Required as Constitutional Necessity*

In *Swift v. Tyson*, 16 Pet. 1 (1842), this Court mistakenly construed the original Judiciary Act (Act of Sept. 24, 1789) as requiring the application of local law only for titles to "things having a permanent locality, such as the rights and titles to real estate." In *Erie v. Tomkins*, 304 U.S. 64 (1938), this Court overruled *Swift*, saying that in applying the *Swift* doctrine the Court had "invaded rights which in our opinion are reserved by the Constitution to the several States." (304 U.S. at 79-80).

Even *Swift*, which this Court said in *Erie* was an unconstitutional invasion of rights reserved to the States, had acknowledged that local law must govern land title

disputes. Thus, if *Swift* represented an unconstitutional construction of the Judiciary Act even though it acknowledged the necessity of applying local law to resolve all real property disputes, it necessarily follows that *Hughes* and *Bonelli* are much more serious invasions of the rights reserved by the Constitution to the States.

While *Erie* has been refined, if not slightly eroded, by subsequent decisions of this Court, *Hughes* and *Bonelli* are the only decisions which require or allow the application of federal decisional law to land title disputes concerning the beds and shores of navigable waters. As recently as 1973 this Court observed that "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

If this Court is to permit *Hughes* and *Bonelli* to stand, then, at the very least, it would seem advisable to explain the strange and circuitous route which this Court has traveled from *Swift* to *Erie* to *Hughes* to *Bonelli*.

G. *Equal Footing Requires State Law*

Both *Hughes* and *Bonelli* violate the constitutional equality of the States under the equal footing doctrine. *Hughes* is based primarily on the theory that federal land grants and patents raise federal questions as to the measure and effect of riparian rights derived from the

original grant. The Original States and Texas (as a sovereign republic when admitted to the Union) would seem to be immune from the *Hughes* doctrine because land titles in those States did not derive from federal grants. Thus, if *Hughes* remains in force and effect, the Court is confronted with a dilemma. If, on the one hand, *Hughes* is confined to States where land titles derived from the United States, then the Original States and Texas enjoy a superior footing; but if, on the other hand, *Hughes* is applied to all of the States, then the Original States and Texas will suffer a substantial diminution and impairment of their rights in the beds and shores of their navigable waters.

And the latter result, surprising as it may be, would seem to be required under the rationale of *United States v. Texas*, 339 U.S. 707 (1950). In the *Texas* case this Court expressly recognized that Texas had owned the marginal seabed adjacent to its coast upon her admission to the Union, but held that Texas must be deemed to have surrendered and relinquished such ownership to the United States upon her admission to the Union. The Court did not suggest that Texas intended to surrender such ownership, but said that the result was a constitutional necessity to preserve equal footing among the States; otherwise, Texas would enjoy a higher status and superior footing since no other State owned any part of the marginal seabed.

It is important to emphasize that Texas' regulatory authority and police power jurisdiction were not at issue—the question was confined to proprietary rights. If the *Texas* rationale is correct, then federal decisional

law cannot divest States of title to beds and shorelands only where titles are derived from the United States; but, as a matter of constitutional equal footing, it will be necessary to expand federal decisional law to resolve similar conflicts in the Original States and Texas as well.

Bonelli presents a similar dilemma. There, the Court elected to diminish the rights of the States in the beds and shores of their navigable waters by re-defining the equal footing doctrine. In so doing, it was said that such state title is "defeasible" by the application of federal decisional law to recognize accretions along the Colorado River. But it was not made clear whether all States have such a defeasible title, or whether it is only those States that were subsequently admitted into the Union.

This is, indeed, a difficult dilemma. If *Bonelli* is to be confined to States admitted into the Union on an "equal footing" with the Original States, then any notion of "equal footing" is an absurdity. If, on the other hand, *Bonelli* is to be extended to the Original States, the absurdity increases, because this Court then would have to say that when the Thirteen Colonies successfully revolted against England and became free and independent nations, they received a "defeasible" title to the beds and shores of their navigable waters. This, of course, is preposterous.

Thus, however sliced, both *Hughes* and *Bonelli* make a mockery of the equal footing doctrine.

H. *State Law Required to Protect Vested Rights of States*

For a century prior to 1967, this Court held that state title to the beds and shores of navigable waters was not defeasible. Both *Hughes* and *Bonelli*, operating under separate theories, serve to overrule those cases and make titles defeasible that previously were not defeasible. Whatever the rationale, and despite the semantics employed, the obvious and inescapable result is that *vested* and *indefeasible* property rights of the States, which were recognized under the prior decisions of this Court, are now subject to divestment by the retroactive application of the *Hughes* and *Bonelli* decisions.

Concurring in the result of *Hughes*, Mr. Justice Stewart observed that such a course of action would be an unconstitutional deprivation of property rights if the Supreme Court of Washington did it to a private person. Even though a "State" might not be a person within the meaning of the due process clause of the Fifth Amendment, it is no less offensive for the property rights of the States to be taken by a retroactive judicial decision.

I. *State Law Required to Protect Vested Private Rights*

While the States have certain responsibilities to protect the public interest which arises from the public trust in navigable waters, States can and do lease, sell and otherwise dispose of parts of the beds and shores

of navigable waters when such disposition will serve a public purpose, or will not interfere with public needs and interests, or when, in general, the States decide that the public interest would be advanced by such disposition. California has reported that it has issued more than 472 tideland patents to private parties (Brief of California, *et al*, as *amici curiae*, at p. 5). Utah and New Mexico have similarly issued a substantial number of leases and patents to private persons. Since these private lessees and grantees can receive no better title than that conveyed by the State as grantor, it necessarily follows that both *Hughes* and *Bonelli* will serve, retroactively, to divest the titles that unquestionably were valid under the law (including the decisions of this Court) at the time those titles were acquired.

J. *State Law Required to Protect Public Interest and Public Trust*

Hughes and *Bonelli* do violence to the public trust and to public interests in navigable waters and shorelands. This is directly illustrated by the parties actually before the Court in *Hughes*, where the land involved was a "dry sand" area on the beach of the Pacific Ocean. No one denied that the State of Washington had earlier owned this land, but the wave-action had washed and deposited additional sand and raised the elevation to a level where the beach area in question no longer was covered by the average of the high tides. Thus, all that had happened was that the state's land had received a coat of additional sand. Mrs. Hughes claimed that this new coat of sand caused an "accretion"

which converted the public beach into her private beach, and this Court agreed, thereby depriving the State and the public of a valuable recreation area. Under Washington's local law, the State would have retained ownership and the beach would have remained a public asset, but this Court created a new federal decisional law of riparian rights to convert the public beach into a private beach, and, under any reasonable reading of this Court's earlier decisions, conferred a private windfall on Mrs. Hughes.

Other potential impacts on the public interest could be much more severe. California has pointed out that substantial portions of the business districts of San Francisco, Oakland, Long Beach, San Diego, San Raphael and Eureka have been built on land acquired from the State through tideland patents (Brief of California, *et al*, as *amici curiae*, at p. 5). Utah has issued shoreland leases and patents for a number of public developments, including boating, bathing, and recreational facilities on shorelands where such facilities will be open for public use. Utah has also conveyed a large tract of such shorelands to the United States for a Federal Migratory Waterfowl Refuge (one of the largest in the world), and has issued shoreland patents to the State Department of Highways for the construction of segments of Interstate Highway 15 and Interstate Highway 80.

Under either *Hughes* or *Bonelli*, it is conceivable that private upland owners will successfully assert riparian rights under newly-created federal decisional law to obtain title to metropolitan areas, public recreational

facilities, a federal migratory waterfowl refuge, segments of the national Interstate Highway System, and *ad infinitum*.

It is thus clear that *Hughes* and *Bonelli* threaten to do great mischief to the public interest. And it is difficult to perceive any counter-balancing public interests advanced by those cases. *Hughes*, as noted, converted a public beach to a private one, and *Bonelli* converted a state-owned parcel of land near the Colorado River to private grazing land.

K. *State Law Required to Avoid Clouds on Real Estate Titles*

Even where ownership interests validly acquired under state law prior to 1967 are not actually divested by *Hughes* or *Bonelli*, it is clear that serious clouds have been cast on all titles to shorelands adjacent to navigable waters. And, because of the implications of constitutional equal footing (discussed in Item G, above), these clouds necessarily extend to the Original States and Texas. The law favors stability and certainty in real estate titles, and stability and certainty were provided prior to 1967 by the laws of the respective States. That has now changed.

A well-respected title lawyer, expressing frustration with *Hughes* the year following its decision, wrote:

> For over forty years, title examiners have relied on a Utah Supreme Court decision which apparently had established authoritatively that the doctrine of accretion and reliction was not extant as to the beds of navigable waters in Utah. *Shearer, Federal Land Grants to the States: An Advocate's Dream; a Title Examiner's Nightmare*, 14 Rocky Mountain Mineral Law Institute, 193-94 (1968).

Title examiners will now be hard put to render definitive opinions on the status of titles to lands adjacent to navigable waters, lending institutions will be reluctant to fund developments, and general frustration and uncertainty will prevail.

L. *Federal Law Protects No Private Interests*

Hughes and *Bonelli* would not only have been justified, but would have been required as a constitutional necessity, if upland owners had had valid, vested riparian rights that had been taken by the States without due process of law. But that was not the case.

Under the law as it existed prior to 1967, no riparian rights existed unless, and to the extent that, such rights were created and recognized by local law. If any riparian rights can be said to exist today by virtue of federal law, those rights must have their origin either in the *Hughes* decision in 1967 or the *Bonelli* decision in 1973.

In short, *Hughes* and *Bonelli* did not serve to protect existing riparian rights—they laid the foundation for creating such rights where none had existed before under any federal statutory or decisional law.

M. *Federal Law Would be All-Pervasive*

It seems axiomatic that federal decisional law

under *Hughes* and *Bonelli* would have to be applied to disputes between private upland owners and private persons holding patents or leases to shorelands and tidelands derived from the States. This would be so because, as noted above, grantees and lessees of the States could receive no better title than that which had been held by the States at the time of the lease or conveyance.

Further, because of the implications of constitutional equal footing, it would seem that such disputes, subject to resolution by federal decisional law, would extend to each of the Fifty States. Thus, *Hughes* and *Bonelli*, if left intact, promise to be very pervasive doctrines.

N. *Federal Law Would Burden the Federal Judiciary*

This Court surely can take judicial notice of the work-load of the federal courts. If *Hughes* and *Bonelli* remain in effect, the federal courts will not only be called on to decide a never-ending series of disputes to shorelands and tidelands, but will be required, in the process, to develop a body of federal property law equal to the range of disputes that arise. The present case is merely a harbinger of things to come. It is assumed that, constitutional implications aside, this is a burden that would not be welcomed by the federal courts—unless such a task was necessary. And it is not.

O. *Bonelli's "Public Interest" Criteria Are Impractical*

If *Hughes* remains in effect, then it seems clear that whenever a party to a riparian dispute can trace his title to a federal grant, then his riparian rights will be determined by federal decisional law. *Bonelli* presents additional complications, because in that case this Court placed great emphasis on a consideration of "public interest" criteria to determine whether it was important for Arizona to own the land there in dispute. The Court concluded that there was not a sufficient public interest, and invoked a federal accretion doctrine to divest Arizona of title.

But how are these public interest criteria to be applied by the federal courts in future cases? Is the State required to prove, as part of a title adjudication, all of the public policies, programs, interests and possibilities relating to the land in dispute? And is the private riparian claimant to counter this evidence by presenting his plans, interests, hopes and expectations for the property? And is the court then to weigh the respective public and private interests to be affected by its decision, and, as a matter of judicial policy, decide who owns the land?

That approach does not sound much like an adjudication of land titles under rules of property law. It sounds more like a federal administrative officer examining an environmental impact statement under NEPA to decide whether, as a matter of policy, a proposed federal action should proceed.

P. *Federal Law Would Protect No Federal Interest*

It has already been noted that federal decisional law under *Hughes* and *Bonelli* protects no private rights, but merely creates them. It is now to be noted that federal decisional law protects no federal interest. Federal regulatory authority over navigation which arises under the Commerce Clause, and federal admiralty jurisdiction which arises under the Judiciary Clause, are clearly supreme federal powers that in no way are affected by the adjudication of land titles by the States. Federal regulatory authority over the navigable waters of the United States will follow the Willamette River, unaffected by Oregon's local law governing ownership rights in the bed and shorelands.

Federal property rights in water, such as the reserved water rights of the United States, have nothing to do with ownership rights in the shorelands. And, even when the United States is a direct claimant to the land is dispute, as it was in *United States v. Holt State Bank*, 270 U.S. 49 (1926), there is no reason why the local law should not control (as it indeed controlled in the *Holt* case).

Thus, there are no genuine federal interests to be protected or advanced by applying federal decisional law to riparian conflicts in the States. Neither *Hughes* nor *Bonelli* revealed any such genuine federal interest, although *Hughes* did note that the land there involved was adjacent to the Pacific Ocean and that the national interest in the international sea was substantial. This, however, was not a persuasive observation because

it is extremely difficult to see how any federal interest was advanced by converting the state-owned public beach into a private preserve for Mrs. Hughes. If that result advanced the federal interest in the international sea, the Court failed to explain why or how.

Q. *Federal Law is Inapplicable in Appropriation States*

Many Western States, including Utah and New Mexico, have never recognized the riparian rights doctrine and that regime has never been a part of their local law. Such rejection of riparian rights, even though land titles derived from the United States, was expressly approved by Congress in various statutes and was confirmed by this Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Consequently, it is particularly inappropriate for the Court to announce at this late date (1967 and 1973) that riparian rights are an essential part of federal common law and must replace state rules of property law.

R. *States' Rights in Beds and Shores of Navigable Waters Do Not Derive from Federal "Grants"*

In *Bonelli* this Court seemed to suggest that Arizona received title to the bed of the Colorado River within that State as part of a federal grant under the equal footing doctrine at the date of Arizona's statehood. As such the Court proceeded to examine the nature, limits, and defeasible nature of the grant. But

it was an incorrect characterization to view the state's title as derived from a federal grant.

The States receive title to the beds and shores of navigable waters by virtue of constutional equal footing. Congress does not enact any statute to provide for such a grant. The Secretary of Interior does not issue any deed or patent.

Prior to the creation of a State, the Federal Government holds title to the beds and shores of navigable waters in trust for the future State when it is created, and upon its admission to the Union title automatically passes as a constitutional necessity in order to give the newly-created State the same measure of ownership and control over navigable waters as that held by the Original States (*Shively v. Bowlby*, 152 U.S. 1 (1894)). The only federal "grant" would be that provided by Congress in the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (Of course, Congress has made a number of land "grants" to the States for public purposes, the most notable of which are the grants for educational purposes, as contained in the Enabling Acts of "public-land" States; and, when school land grants in place do not pass because of federal pre-emption or private entry prior to survey, other lands of equal acreage are granted as indemnification. See 43 U.S.C. 851 *et seq.*).

There is an anomaly to be noted. The ownership rights of the States in the beds and shores of navigable waters should occupy a superior status, and should receive vigilant and dedicated protection. It must be emphasized that States receive title to the beds and

shores of navigable waters as a *constitutional requisite* to preserve equal footing among the States. This constitutional equality involves not only ownership of such lands but sovereign regulatory authority over them, and a public trust is imposed on such waters and lands. This public trust does not derive from any federal source, and no federal question is involved. It derives as an integral aspect of equal footing so that the people within the newly-admitted State will enjoy the same rights as the people in the Thirteen Colonies at the conclusion of the American Revolution—and before the Federal Government was born.

The anomaly, then, is that even though state title is intertwined with sovereign regulatory rights and public trust responsibilities, and even though members of the public have a vital stake in public ownership of these lands, this Court has declared that private parties who hold common grants and patents under federal statutes have a title superior to that of the States. The States, this Court held in *Hughes* and said in *Bonelli*, have only a "defeasible" title which may be taken by private upland owners under rules of federal decisional law. The "riparian rules of property law," as fashioned by the Court, serve not only to convert public-trust land to private land, but also serve to extinguish public rights and the states' sovereign jurisdiction which, at statehood, was deemed to be a constitutionally protected property right.

And it was so considered by this Court from the birth of the Republic until 1967.

III. *NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE EQUAL FOOTING DOCTRINE*

A. *Law of England*

Ownership of shores and banks, as well as submerged lands, developed in large part from the law in England as it pertained to the rights of the public, the Parliament, and the King in navigable waters, subjacent and adjacent lands. *Shively v. Bowlby* 152 U.S. 1 (1894). The ownership rights of the Crown and Parliament were both in a proprietary and a governmental capacity, but they were subject to certain public uses for navigation and fishing, and perhaps recreation. These public uses were deemed to be public rights in a limited sense and are often referred to in judicial decisions as a "public trust," which now imposes on States certain obligations to protect public interests in their navigable waters. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In England the King could, in early times, make grants of the shores to private parties and extinguish public rights, but later statutes enacted by Parliament prevented this practice, so that only the Parliament had the power to diminish such public rights. *R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, at 106-08 (2d ed. 1875).

B. *The Original States*

As a result of the American Revolution, the Thirteen Colonies succeeded to all of the rights of both the English King and Parliament in and to navigable waters, their beds, and adjacent shores. When these colonies formed the Federal Union, and became the Original States, they did not surrender any of these ownership rights or proprietary interests to the United States, but did grant certain regulatory powers to the Federal Government. *U.S. Const., art. I, §8, para. 3; and art. III, §2, para. 1.*

The first case to deal with the specific question of state ownership of navigable waters and their beds did not arise until 1842, when this Court said that New Jersey, as one of the Original States, became, as a result of the Revolution, immediately and rightfully vested with all of the ownership rights, sovereignty and jurisdiction of navigable waters within its borders as had earlier been vested in the English Crown and Parliament. *Martin v. Waddell*, 16 Pet. 367 (1842).

Three years later this Court was required to consider whether subsequently-admitted States were entitled to the same sovereign and proprietary rights as the Original States. Alabama, the State involved, had not been an Original State, but had been created from federal territory. The Supreme Court said that, upon the admission of Alabama to the Union, as a matter of constitutional equal footing with the Original States, she was entitled to all of the navigable waters and the soils under them within the State, declaring:

> . . . to Alabama belong the navigable waters, the soils under them in controversy in this case, sub-

> ject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights. *Pollard v. Hagan*, 3 How. 212, 229 (1845).

This same declaration of equal sovereign and proprietary rights of all of the States to the navigable waters and underlying soils within their borders has consistently been applied by the Court in all subsequent cases where the issue arose. See, *e.g.*, *Barney v. Keokuk*, 94 U.S. 324 (1876); *U.S. v. Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64 (1931); and *Utah v. United States*, 403 U.S. 9 (1971).

C. *Navigable Waters Defined*

In England the rights of the public, Crown and Parliament extended only to navigable waters. As an island, England did not have any significant waters susceptible of navigation that were not affected by the tides, and so the test of navigability in that country became whether the waters were affected by the ebb and flow of the tide, *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443, 454-56 (1851). If so, the waters were navigable; if not, the waters were not navigable. If the waters were not navigable, there were no public rights of navigation or fishing. Lough Neagh is the largest inland lake in the United Kingdom, having a surface area of about 150 square miles, but there are no public rights to fish in that Lake, as is made clear by Lord McNaghten, speaking for the House of Lords:

> At the outset of his judgment, Ross, J., states two propositions of law. They are these: (1) The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. (2) No right can exist in the public to fish in the waters of an inland non-tidal lake. These propositions were accepted by the Court of Appeal. They were only faintly questioned at the Bar. Speaking for myself, I heard no argument tending in the slightest degree to shake their authority. I think that they are incontrovertible. I may add that in my opinion there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. In this country one and the same law applies to inland non-tidal waters whatever the size of the water space may be. *Johnson v. O'Neill*, 105 Law Times Rpt. 587, 597 (House of Lords, 1911).

The United States Supreme Court initially adopted the English test of navigability, holding that federal admiralty and maritime jurisdiction did not extend to the Missouri River because it was above the ebb and flow of the tide. *The Thomas Jefferson*, 10 Wheat. 428 (1825). However, in 1851 this Court rejected the tidal test as unsuitable for the United States, and held that all waters, navigable in fact and constituting a link in interstate or foreign commerce, whether or not affected by tides, were within the admiralty and maritime jurisdiction of federal courts. *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1851).

While it was thus clear that tidal effect *was not* the test of navigability, what *was* the test was less certain. Clarification came in 1870, when this Court de-

cided that the federal power to regulate commerce (licensing vessels on the river) extended to a relatively small inland river. The Court said:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of water. There, no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different.
>
> Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

The language of the Court quoted above related to the exercise of the federal power to regulate commerce in navigable waters, and not to property ownership. But in *Barney v. Keokuk*, 94 U.S. 324 (1876), this Court

made it clear that the same test was to apply to determine ownership of shorelands. The question was whether such land was owned by the owner of the adjacent upland. Under English law, the owner of the upland would own the disputed tract; if the test of navigability as applied in *The Daniel Ball* were to be followed, the State of Iowa would own it. The Court held the Mississippi River to be navigable and found ownership to be in the State of Iowa:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections . . . And since this court . . . has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It

> properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. 94 U.S. at 338.

All waters, then, that are reasonably capable of supporting commercial water craft, in the manner and mode customary at the date of a State's admission to the Union, are deemed navigable waters, and the beds and shores are owned by the States. *United States v. Utah*, 283 U.S. 64 (1931). This is true whether the water is navigable in interstate commerce or only in intrastate commerce. *United States v. Utah, supra.* Federal jurisdiction over admiralty and maritime matters, and the federal power to regulate navigation, extends only to those waters that are navigable in interstate or foreign commerce. *The Robert W. Parsons*, 191 U.S. 17 (1903) (admiralty); *The Montello*, 20 Wall. 430 (1874) (navigation). But these federal jurisdictional and regulatory powers have nothing to do with the ownership rights of the States, except that state ownership is subject to the exercise by the Federal Government of superior jurisdictional and regulatory powers.

D. *Non-Navigable Waters*

Historically, public rights attached to navigable waters because of the public need to use such waters. Since the basic public use was navigation, it was assumed that waters not susceptible to navigation were not required for public use. As a consequence, there

were no public rights in non-navigable waters, their beds, or banks. *Shively v. Bowlby* and *Johnson v. O'Neill*, both *supra.* The bed and banks were owned by the adjacent landowners, ordinarily called riparian owners because they owned land adjacent to or riparian to water in a natural lake or stream. *Wiel, Water Rights in the Western States*, vol. 1, 832 et seq. (3d ed. 1911). Riparian owners also had certain rights in the watercourse, at least in the Eastern States, to the extent that the water adjacent to their land could not, by the acts of others, be unreasonably diminished in quantity or quality. *Shively v. Bowlby, supra.*

E. *State Ownership as Integral Part of Public Trust*

It is important to emphasize that the States have a general police power to regulate certain conduct on private property and to regulate, to some extent, the use of private property. Thus, even though the beds and banks of non-navigable watercourses are privately owned, the States can prosecute crimes committed thereon, abate nuisances, promulgate reasonable zoning ordinances, etc. But it is equally important to emphasize that police power authority serves as no basis for declaring public rights of use on private property. For example, it is clear that a privately-owned farm will not be subject to *public use* for pheasant hunting, against the wishes of the owner, through any police power regulation by the State, even though, if hunting is conducted thereon, state regulations will control as to seasons, licensing and bag limits. Public rights might be acquired through purchase or eminent domain, with just

compensation paid to the owner, but public *regulatory power* cannot be converted into a *public proprietary right*. Thus, it is clear that private rights to the shores, beds and banks of non-navigable waters cannot be encumbered or diminished by state regulation to create rights of use in the public. This is why state ownership of the beds and shorelands of inland navigable waters is of extreme importance to protect public rights of use.

Public rights of use depend upon (1) public rights in the watercourse and (2) state governmental power to regulate and protect such existing rights. This Court has said as much:

> The State holds the propriety of this soil for the conservation of the public rights of fishing thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. . . . *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve those public uses for which the soil is held.* *Smith v. Maryland*, 18 How. 71, 75 (1855) (Emphasis added).

IV. *NATURE OF STATES' RIGHTS IN THE BEDS AND SHORES OF INLAND NAVIGABLE WATERS BY VIRTUE OF THE SUBMERGED LANDS ACT*

A. *Preface*

Congress confirmed in the States title to the beds and shores of all inland navigable waters, including all natural resources in such lands and all resources in such

waters, by virtue of the Submerged Lands Act, Act of May 22, 1953, c. 65, 67 Stat. 29, now codified as 43 U.S.C. 1301 *et seq.*

The Submerged Lands Act resulted from decisions of this Court which had held that coastal States did not own the marginal seabed adjacent to their shores. In order to obtain the support of the inland States, and thus gain sufficient congressional support to enact legislation which would grant a three-mile strip of the marginal seabed to the coastal States, those States included provisions in the bill which would confirm in the inland States title to the beds and shores of inland navigable waters.

The judicial and legislative history of the Submerged Lands Act is particularly significant because it demonstrates that this Court and the Congress have always attached extreme importance to state ownership of the beds and shores of inland navigable waters, as well as to the resources within such lands and waters.

This Court suggested in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), that the Submerged Lands Act did not serve to convey any federal interest to the States with respect to inland navigable waters. That observation might not be justified. While it is true that the States have always owned the beds and shorelands of their inland navigable waters, circumstances might arise where the Submerged Lands Act would serve to grant property interests in such waters to the States.

In fact, the United States Solicitor General re-

cently took such a position. In *Utah v. United States*, 403 U.S. 9 (1971), an issue arose as to the ownership of minerals contained within the waters of the Great Salt Lake. The Solicitor General thought that there might have been some question as to state ownership of minerals in solution by virtue of the equal footing doctrine, but thought that the Submerged Lands Act had removed any doubt. In his memorandum filed with this Court in April, 1972, the Solicitor General observed at pp. 7-9:

> The authorities are inconclusive concerning the general federal law on the question here — whether despite the Lake's navigability, the United States still owned any of the minerals in the bed of the Lake or in its brines. . . . As between the parties here—the United States and Utah—the federal rights, as defined by federal law, ordinarily would be paramount. It is plausible that under federal law not only the water, but also the minerals in it would be subject to exclusive federal control. . . .
>
> These questions apparently need not be resolved in this case, however, because of the Submerged Lands Act of 1953. . . . By that statute the federal government, with certain exceptions not pertinent here, "released and relinquished" to the respective states "all right, title, and interest of the United States" with respect to all "lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters. . . . "Natural resources" are defined as "includ[ing], without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . ." Thus the Submerged Lands Act explicity vested in Utah the bed of the Lake and all natural resources in the bed or in its waters which by definition include "oil, gas, and all other minerals." The congressional hearings and debates seem to indicate that the Act conferred on the State ownership of minerals dissolved in the waters as well as situated in the bed. . . . Although we can present no substantial argument to refute Utah's claim that under the Submerged Lands Act it, rather than the United States, owned the minerals in question prior to the conveyance, we think that the issue should be decided by this Court.

The issue was decided by this Court, and all such minerals were adjudicated and decreed to be owned by the State of Utah. *Utah v. United States*, 406 U.S. 484 (1972).

Further, the legislative history of the Submerged Lands Act identifies with particularity the exact acreage of beds and shorelands in inland navigable waters that was to be released, relinquished and confirmed in the States. While the Act requires as a condition to such confirmation that the waters be navigable under the federal test of navigability, this specific identification of lands by Congress creates a presumption that the overlying waters are navigable. See, *e.g.*, ***Water Policies for the Future***, Final Report of the National Water Commission, at p. 275 (1973); and ***Public Access Rights in Waters and Shorelands***, National Water Commission Publication PB-205-247, pp. 17 *et seq.* (July 1, 1971).

The two most significant aspects of the Submerged Lands Act, so far as present purposes are concerned,

are that Congress (1) attached extreme importance to state ownership of the beds of navigable waters, and specifically released and relinquished to the States all federal proprietary interest that otherwise might have existed in the beds and shores of inland navigable waters and in all natural resources, whether fauna, flora or mineral, within such waters or lands; and (2) declared that state law should control such questions as accretion, reliction, erosion and avulsion. Therefore, a careful review of the judicial and legislative background of the Submerged Lands Act is well worthwhile.

B. *Judicial History of Submerged Lands Act*

The Submerged Lands Act was passed in response to decisions issued by this Court in what popularly are referred to as the submerged lands cases: *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950). (For a recent decision following the rationale of those cases, see *United States v. Maine*, 420 U.S. 515 (1975)). All three cases involved the question whether the States owned the bed of the marginal sea (the seabed located below the tidelands). So far as relevant here, the *California* case (the first to be decided) represented a claim by the State that, since the:

> . . . original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal

> footing" with the original states, California at that time became vested with title to all such lands. (322 U.S. at 23).

The Court rejected California's argument, pointing out that the Original States had not claimed any part of the bed of the marginal sea, but only the beds of navigable waters located within the boundaries of the States (these waters were termed "inland waters" and included tidelands as well as navigable waters not affected by the tides). Since the Original States did not claim or assert dominion over the bed of the marginal sea, the Court reasoned that California could claim no such ownership under the equal footing doctrine. The Court went on to point out that it was the Federal Government, after the Union was formed, that first staked out a claim to the marginal sea and exercised dominion over it, and further justified its holding by detailing the national interests that were critically involved in the marginal sea around the nation's coastline.

The *Louisiana* case, decided three years later, involved a similar claim by the State of Louisiana, and the Court rejected the arguments of the State, viewing its decision in the *California* case as dispositive of the question.

But the *Texas* case, decided at the same time as the *Louisiana* case, presented a somewhat different problem. Texas, as a Republic prior to statehood, had owned, both in a sovereign and proprietary capacity, the bed of the marginal sea in the Gulf of Mexico (at least to the extent of three statute miles from the shore).

Thus, Texas did not claim title by virtue of the equal footing doctrine, but by prior ownership and possession, asserting that, after statehood, such ownership was subject only to the regulatory and jurisdictional powers conferred on the United States by the Constitution. It was the Government who invoked the equal footing doctrine in the *Texas* case, pointing out that if Texas owned such seabed, it would be in a better position than the other States who did not own the seabed. The Court adopted the argument of the Government, holding that the equal footing doctrine cut both ways, and declaring that Texas could not have an ownership interest in the bed of the marginal sea when the other States had no such ownership:

> The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she became a sister State on an "equal footing" with all other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the

> transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States. (339 U.S. at 717-18).

The submerged lands cases are history in the sense that Congress responded by passing the Act of May 22, 1953 (67 Stat. 29, 43 U.S.C. 1301 *et seq.*), vesting the coastal States with title to the bed of the marginal sea (three geographical miles distant from the coastline of each such State). But the submerged lands cases were fully consistent with the prior decisions of this Court relating to state ownership of the beds and shores of inland navigable waters, including tidelands. The Court simply pointed out that the Original States had never owned any part of the seabed, and as a matter of constitutional equal footing, no State could claim such seabed; and, indeed, in the case of Texas, it was necessary to take away such ownership in order to preserve constitutional equal footing.

It can easily be shown that the submerged lands cases, in discussing the reasons why the States did not own the bed of the marginal sea, did reaffirm state ownership of tidelands and inland navigable waters. In the *Texas* case, this Court cited *United States v. Oregon*, 295 U.S. 1 (1934), as a good summary of the basis for state title to the beds of inland navigable waters (339 U.S. at 716-17).

And in the *California* case the Court explained that one justification for state title to the beds of inland navigable waters was that local and state interests were there involved, and that a corresponding justification

for national control of the marginal seabed was that national interests were involved. Thus:

> If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying seaward in the three-mile belt. (332 U.S. at 36).

Or, again, as it was the belief that national interests compelled national rights in the sea bed, so it was the:

> . . . belief that local interests are so predominant as *constitutionally to require state dominion over lands under its land-locked navigable waters* . . . . (332 U.S. at 34) (Emphasis added).

With this series of cases decided, Congress passed the Submerged Lands Act, vesting title in the coastal States to the bed of a three-mile belt of the marginal sea, and confirming the already-existing title in the States to the beds of inland navigable waters. The legislative history of that Act will now be examined.

C. *Legislative History of Submerged Lands Act*

Congressional debate over submerged lands legislation endured over an eight-year period, during which three bills were passed by Congress. The first two were vetoed by President Truman and the third became law on May 22, 1953. All three bills purported to confirm in the States title to all inland navigable waters and the resources therein.

The proponents of the legislation (active support from 45 of the then 48 States) argued that the submerged lands cases had cast a cloud upon state ownership of the beds and shores of inland navigable waters, and that federal legislation confirming state title was necessary to remove the cloud.

On the other hand, the opponents of the legislation (including President Truman and the Administration) argued that it was unnecessary to confirm state title to inland waters and the resources therein because such state title had always been recognized and never questioned. Such a course of action, it was said, was simply a devious maneuver by coastal States to marshall support in Congress to obtain ownership of the three-mile belt of the bed of the marginal sea.

The primary purpose of the Act, of course, was to convey to the coastal States a three-mile belt of the marginal seabed and the resources therein—and the Act accomplished that purpose. But the point of present relevance has to do with state ownership of the beds and shores of navigable waters, and it will be seen that Congress clearly and expressly confirmed in the States title to an "absolute minimum" of 84,585,600 acres of land. Of this total, 17,029,120 acres were land within the three-mile belt of the marginal seabed, 38,595,840 acres were lands underlying the Great Lakes, and the remaining 28,960,640 acres were lands underlying other inland navigable waters.

During the 1930's and 1940's, considerable interest developed in the bed of the marginal sea as a source of

petroleum, particularly off the California coast. The State of California issued a number of oil and gas leases within a three-mile belt of the marginal sea along the California coastline, assuming that such seabed and natural resources therein were state-owned. The Federal Government became very much interested in the potential oil reserves in the bed of the marginal sea and began to examine the possibility of federal ownership of such seabed.

On May 29, 1945, the United States Attorney General, at the request of President Truman, filed suit against the State of California to determine whether the United States or California owned the bed of the marginal sea within the three-mile belt.

Needless to say, the coastal States immediately became concerned when the United States began to question state ownership of the three-mile belt of the marginal seabed. While the *California* case was still in litigation, and prior to its decision, the coastal States generated a good deal of activity in Congress to resolve any ownership questions in favor of the States. In order to marshall sufficient support in Congress to resolve such questions in favor of the States, it was suggested that state ownership of the beds of navigable waters was in jeopardy, and that state title should be confirmed to inland waters and tidelands as well as the bed of the marginal sea. This would have been the effect of House Joint Resolution 225 (79th Cong., 2d Sess., 1946), but it was vetoed by President Truman on August 1, 1946. In his veto message, the President pointed out that the *California* case had been filed at his direction, and that

he considered the Supreme Court, rather than the Congress, to be the proper forum for determining state versus federal rights in the seabed. Moreover, the President pointed out that tidelands and inland waters would in no way be threatened, and that the Government had been willing, during the congressional debate on the measure, to give an outright disclaimer of any federal ownership as to the beds of such waters, but that Congress had rejected such an offer:

> The Supreme Court's decision in the pending case [*United States v. California*] will determine rights in land lying beyond ordinary low-water mark along the coast extending seaward for a distance of 3 miles. Contrary to widespread misunderstanding, the case does not involve any tidelands, which are lands covered and uncovered by the daily ebb and flow of the tides; nor does it involve any lands under bays, harbors, ports, lakes, rivers, or other inland waters. Consequently the case does not constitute any threat to or cloud upon the titles of the several States to such lands, or the improvements thereon. When the joint resolution was being debated in the Senate, an amendment was offered which would have resulted in giving an outright acquittance to the respective States of all tidelands and all lands, under bays, harbors, ports, lakes, rivers, and other inland waters. Proponents of the present measure, however, defeated this amendment. This clearly emphasized that the primary purpose of the legislation was to give to the States and their lessees any right, title, or interest of the United States in the lands and minerals under the waters within the 3-mile limit. (H. Doc. No. 765, 79th Cong., 2d Sess.) (See Senate Report No. 133, Part 2, p. 113, 83rd Cong., 1st Sess.)

As a result of the presidential veto, congressional activity did not abate on the submerged lands question, but continued to flourish, with vigorous proponents and opponents both for state ownership and federal ownership. Then, after the Supreme Court had decided the *California, Louisiana* and *Texas* cases, all *supra,* Congress again sought to vest and confirm state ownership, not only to the three-mile belt of the marginal sea, but also to tidelands and inland waters. This congressional declaration came in 1952, as Senate Joint Resolution 20, but was also vetoed by President Truman on May 29, 1952. In this veto message the President said that he considered the Joint Resolution to be an unjustified gift of submerged lands to a few coastal States, at the expense of the nation as a whole, because the inland States were getting nothing but deception in the confirmation of title to the beds of inland waters. This was so, thought the President, because the States already owned such lands:

> It has been claimed that such legislation as this is necessary to protect the rights of all the States in the lands beneath their navigable inland waters. It has been argued that the decisions of the Supreme Court in the California, Louisiana, and Texas cases have somehow cast doubt on the status of lands under these inland waters. There is no truth in this at all. Nothing in these cases raises the slightest question about the ownership of lands beneath inland waters. *A long and unbroken line of Supreme Court decisions, extending back for more than 100 years, holds unequivocally that the States or their grantees own the lands beneath the navigable inland waters within the State boundaries.* (Emphasis added).
>
> . . .

> If the Congress wishes to enact legislation confirming the ownership of what is already theirs —that is, the lands and resources under navigable inland waters and the tidelands—I shall, of course, be glad to approve it. But such legislation is completely unnecessary, and bears no relation whatever to the question of what should be done with lands which the States do not now own—that is, the lands under the open sea. (See Senate Report No. 133, Part 2, p. 135, 83rd Cong. 1st Sess.)

The controversy continued as to whether the submerged lands cases had cast any cloud upon state ownership of tidelands and the beds of inland waters. In support of the Submerged Lands Act, the National Association of State Attorneys General prepared a memorandum brief for Congress, which was placed in the Congressional Record, and which suggested that the Supreme Court decisions in the submerged lands cases could be read as portending only a qualified state ownership of tidelands and inland waters to protect the trust of public use; but which contended that such ownership had always been both in a proprietary and sovereign capacity, subject only to superior federal powers granted by the Constitution:

> In English and American jurisprudence two separate and distinct sovereign rights have always been recognized with relation to navigable waters and the soils beneath them. These rights are: (1) proprietorship (jus privatum or dominium), and (2) governmental control for public use (jus publicum or imperium). Proprietorship (jus privatum—using, leasing, collecting revenues) must not and cannot interfere with the regulatory control (jus publicum) because the latter has al-

ways been paramount for the protection of the public uses of commerce, navigation, and fishing. In England both ownership and regulatory control (jus privatum and jus publicum) were vested in the King. Under our constitutional system in the United States the sovereign right of ownership (jus privatum) is vested in the respective States. The sovereign right of governmental control (jus publicum) is divided between the dual State and Federal sovereignties, with the States reserving all of such rights which were not delegated to the Federal Government. Under such a division of sovereign rights, State ownership of lands beneath navigable waters has not in the past and will not in the future interfere with that portion of the jus publicum contained in the paramount constitutional powers of the Federal Government for regulation and control of navigation, national defense, and other Federal powers. (1953 U.S. Code Cong. and Adm. News, p. 1531).

United States Solicitor General Philip B. Perlman responded to the contentions of the States Attorneys General, contending that as to tidelands and inland waters, there never had been and was not any question as to complete state ownership, and challenged the good faith of the States Attorneys General in even raising such an argument:

> . . . the Attorneys General's pamphlet purports to prove that the decisions by the Supreme Court as to the status of the submerged lands of the marginal sea involve the title to the submerged lands of the rivers, harbors, bays, lakes, and other inland waters of the States.
>
> This is not true and never has been true. Those in charge of the quit-claim legislation know it.

> Part of the effort to legitimize the trespass on Federal areas by 3 States at the expense of the other 45 States is directed to concealing the true status of submerged lands of inland waters, and to block legislation proposed by the Government to dispose permanently of baseless and frivolous contentions in which the entire pamphlet is framed. (1953 U.S. Code Cong. and Adm. News, p. 1618).

The States Attorneys General had said, referring among other things, to state ownership of submerged lands, that "This long-recognized rule of law, applicable to the waters and submerged lands of every State, has been destroyed and state titles clouded by the Supreme Court's 'tidelands' decision." Solicitor General Perlman responded:

> It is difficult to deal patiently with this series of misstatements. In the first place it should be noted that the word "tidelands" is a misnomer; the United States does not claim any rights, by reason of national sovereignty, in the soil of lands covered by the tides, and its rights begin at the low-water mark outside of tidelands, and seaward of inland waters, such as rivers, bays, etc., which empty into or are arms of the ocean.
>
> There is absolutely nothing, absolutely nothing, in the decisions by the Supreme Court in the California case or in the Louisiana and Texas cases (citations omitted) which destroys or impairs or affects in any degree any long-recognized rule of law, applicable to the inland waters and submerged lands under inland waters of any State. The Supreme Court in the California case, may fairly be said to have confirmed State rights in lands under inland navigable waters such as rivers, harbors, and even tidelands down to the

low-water mark." (1953 U.S. Code Cong. and Adm. News, p. 1621).

and, further:

> State ownership of submerged lands under inland waters has not been affected by the rejection of State claims to the resources of the submerged lands of the marginal sea, and, as has been shown, beyond even the marginal sea. But in order to take away from quitclaim proponents the opportunity to continue to present such a baseless contention, the appropriate Federal agencies prepared and submitted to Congress a bill releasing and relinquishing to the States, and to all others lawfully entitled, all right, title, and interest of the United States, if any it has, in and to all lands beneath navigable inland waters within the boundaries of the respective States. (1953 U.S. Code Cong. and Adm. News, p. 1623).

The final version of the Submerged Lands Act, identified as Senate Joint Resolution 13 and H.R. 4198 (83rd Cong., 1st Sess.), persisted in including a confirmation of state title for tidelands and inland waters, as well as the marginal sea. The Senate Committee Report explained:

> The joint resolution treats all of the States alike, both inland and coastal, with respect to lands beneath navigable waters within their respective boundaries. As shown by the list in appendix F, every State has submerged lands which are covered by this joint resolution. Comparative totals show far greater areas under inland waters and the Great Lakes, as follows:

	Acres
Lands under inland waters	28,960,640
Lands under Great Lakes	38,595,840
Lands under marginal seas	17,029,120

> All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. (Senate Report No. 133, March 27, 1953 [to accompany S.J. 13], 83rd Cong., 1st Sess., at p. 7).

The lands under the Great Lakes and the belt of land under the marginal sea are not difficult to identify, but the 28,960,640 acres of land under inland waters require further identification. Part of that identification was provided in Appendix F to the Senate Report, which contained a table that listed the exact acreage in each State of lands underlying (1) inland waters, (2) Great Lakes, and (3) the marginal sea.

The same tabulation of acreage for lands beneath inland waters as used by the Senate Report in its Appendix F had earlier been included in the brief of the States Attorneys General which had been placed in the Congressional Record, along with a statement to the effect that such submerged lands contained valuable minerals which produced revenues to support education and other functions of state government, and along with a specific identification of a broad range of mineral resources within and beneath the navigable waters of each State. Oregon, for example, was listed as hav-

ing valuable resources of sand, gravel, oil, gas and kelp. See Cong. Rec., July 24, 1951—Senate, Vol. 97, Part 7, 82nd Cong., 1st Sess., p. 8720.

Solicitor General Perlman had responded:

> This statement [that states were deriving revenues from natural resources within inland waters], standing alone, is undoubtedly true. What is false about it—and the publication with it of lists of the acreages of lands under inland waters, the Great Lakes and the marginal sea; and of the known resources of the waters and the submerged lands of such waters—is the treatment of the facts as if such waters and their submerged lands and resources have been held to be subject to the paramount power and full dominion of the United States. No more complete misrepresentation has ever been made to the Members of Congress of the United States. In this way, and only in this way, could the proponents of the Walter bill dare print a list of every one of the 48 States with the acreages and resources of submerged lands of inland waters, in an attempt to persuade the elected representatives of all the States, that, unless the Walter bill is enacted, they may be deprived of valuable resources belonging to their people. (1953 U.S. Code Cong. and Adm. News, p. 1619).

The Minority Views of those opposing the Submerged Lands Act were published as part of House Report 215 (To accompany H.R. 4198) and as Part II of Senate Report No. 133 (To accompany S. J. Res. 13) (both reports dated March 27, 1953, 83rd Cong., 1st Sess.), wherein a considerable space was devoted to detailing what the Minority Members thought was clear evidence that state ownership of inland navigable waters

had never been challenged by the Federal Government, but in fact had been explicitly and repeatedly recognized. (See, for example, 1953 U.S. Code Cong. and Adm. News, pp. 1440, 1468-69, 1550-55, 1617-40)

As note 1 to Appendix F of the Senate Report explained, the tabulation for lands under inland waters was taken from a Government publication entitled Areas of the United States, 1940, and published in connection with the 16th Census of the United States. That note explains that the acreage figures "are very approximate but are absolute minimums."

A reference to the U.S. Census publication cited shows that there the figures are expressed in square miles, rather than acres, although the figures correspond when converted from square miles to acres. As will be seen, the "approximate" nature of the figures might have resulted from the fact that the basic table for States in the Census report rounded acreage amounts to the nearest square mile, and thus dealt in no units smaller than 640 acres. However, supplementary tables in the Census publication do show a breakdown of lands under inland waters for each county in each State, for each voting precinct in each State, and for all incorporated areas having a population of 1,000 or more persons. Thus, it is possible to locate the exact number of square miles (in these tables the areas is broken down to the nearest one-tenth of a square mile) of inland waters in each voting precinct or minor political subdivision in the entire United States.

This can be demonstrated very easily. The publica-

tion cited, quoted from and relied on by Congress is, as noted, "Areas of the United States, 1940," and was published as part of the 16th Census of the United States by the Government Printing Office in 1942. At page 6 of that publication there appears a table of inland waters for each State. The area is expressed in square miles, rather than acres.

But the figures expressed in square miles correspond exactly to the Senate Report where the figures were expressed in acres. For example, that table lists Oregon as having 631 square miles of land underlying inland waters, which, when multiplied by 640 to convert to acres, exactly equals the 403,840 acres which the Senate Committee Report said were to be confirmed in Oregon. The same publication contains supplementary tables which further identify the lands underlying navigable waters covered by the Submerged Lands Act, as noted below.

The same Census Bureau publication, at pp. 6 through 17, lists the exact acreage of lands underlying inland navigable waters for each county within each of the then forty-eight States. A further and more detailed breakdown of those figures is found at pp. 18 through 304, where the tables are entitled "Land and Water Area of Counties by Minor Civil Divisions: 1940," and where the area is broken down to the nearest one-tenth of a square mile. To illustrate, the table for Oregon appears at pp. 223-31, and the minor civil divisions used are the election precincts of the counties within the State. At pages 418-21 are maps for various parts of Oregon, showing the exact election precincts

set forth in the table appearing at pp. 223-31. Thus, the combination of the table and the maps gives the exact area of land underlying inland water for each election precinct, and the exact boundaries of each precinct can be identified on the maps.

From the foregoing discussion, it is readily apparent that the Submerged Lands Act "confirmed" and "established" title in the States to 84,585,600 acres of submerged lands and shorelands. Of this figure, 17,029,120 acres were lands within the three-mile belt of the marginal seabed, 38,595,840 acres were lands underlying the Great Lakes, and the remaining 28,960,640 acres were lands underlying other inland navigable waters. And, of the latter figure, Oregon has 403,840 acres, or 631 square miles. The marginal seabed and the lands underlying the Great Lakes are not difficult to identify. Nor are the remaining 28,960,640 acres difficult to identify, because the legislative history of the Submerged Lands Act identifies this area to the nearest one-tenth of a square mile for every election precinct or minor civil subdivision in the United States, as shown on maps of those election precincts and minor civil subdivisions as they existed in 1940.

And the Senate Committee Report declared that these acreages were "very approximate *but are absolute minmiums.*" Senate Report No. 133, March 27, 1953 [To Accompany S. J. 13], 83rd Cong., 1st Sess., p. 76, note 1 in Appendix F. Congress confirmed in the States not only title to these lands, but also to all natural resources, whether fauna, flora or mineral, in such lands and overlying waters.

D. *Language of the Submerged Lands Act*

The pertinent provision of the Submerged Lands Act, now codified as 43 U.S.C. 1311(a), provides:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 [the date of the Supreme Court decisions in the *Louisiana* and *Texas* cases], entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof. . . .

With respect to inland navigable waters, 43 U.S.C. 1301(a) provides the following definition:

> . . . all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction. . . .

It should again be noted that federal law is applicable to determine whether waters were navigable at the date of admission of a State into the Union, but

thereafter the "law of the respective States in which the land is located" governs and controls to determine who is entitled to such lands (*i.e.*, to resolve questions of accretion, reliction, erosion and avulsion) (see Section VI of this brief, *infra*). More pertinent for present purposes, however, is the scope of the congressional confirmation of state title. It included not only title to the lands identified and described, but also title to natural resources, which included:

> . . .without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . . . (43 U.S.C. 1301 (e)).

Congress left no doubt about its intention to confirm in the States title to the beds and shores of all inland navigable waters and to all of the natural resources in such lands and waters.

V. *STATE LAW REQUIRED BY JUDICIAL DECISIONS*

A. *Preface*

It is indisputably clear that, prior to 1967, state law applied to resolve disputes concerning the ownership of the beds of inland navigable waters and their shorelands, including all controversies involving reliction, accretion, erosion, avulsion and all other aspects of riparian rights. This will be demonstrated by a review of the decisions of this Court and applicable federal statutes. Before doing so, however, it is important to bear in mind three important clarifications.

First, the land in dispute in the case before the Court is not federal land which will be limited, diminished, restricted or divested by state rules of property law. It is not federal and at all. If it were land that aways had been in federal ownership, then quite clearly federal decisional law would apply, because, as this Court said in *United States v. Oregon*, 295 U.S. 1 (1935):

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control.

In that case, however, the lands in dispute surrounded a small, meandered, *non-navigable* lake. The United States had issued patents to uplands bordering on the meander line, but had, by Executive Order, reserved the area below and within the meander line as a bird refuge. Oregon enacted a statute which asserted state ownership of all meandered lakes within the State, whether navigable or not. Since the lake in question was not navigable, Oregon did not receive title to the lake or its bed at statehood, and title remained in the United States. Thus, this Court held that the Oregon statute could neither divest the United States of title nor determine the effect of the Executive Order.

But it is quite a different matter when title has passed from the United States in accordance with applicable federal statutory and decisional law. Once federal law concludes that title has passed from the Government, then state rules of property law are utilized to measure the nature and limits of the ownership interests

in such land. This Court has consistently expressed this view, well summarized in *Wilcox v. Jackson*, 38 U.S. 498, 517 (1839):

> We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; *but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.* (Emphasis added).

The second important clarification is related to the first, and involves the distinction between the United States as a property owner and claimant, on the one hand, and claims of private parties whose titles are derived from patents issued by the United States. As the following discussion will show, federal law applies in private property disputes *only to the extent necessary to determine whether the patents were effective to convey the federal interest;* and, if so, state law will apply to determine all other ownership questions. When the United States is a party asserting a claim in a proprietary capacity, then federal law applies only if it is necessary to determine whether the United States parted with title, and state law applies to determine the extent of the federal claim when such claim is based on common law rules of property—as explained by *Wilcox v. Jackson, supra;* and see *United States v. Holt State Bank*, 270 U.S. 49 (1926).

The third distinction is an obvious one, and hardly needs to be noted. When the United States exercises regulatory authority, as under the Commerce Clause, the nature and limit of such regulatory authority are always federal questions. But in the present case no such regulatory authority is involved.

With these distinctions in mind, it is interesting to review the decisions of this Court prior to 1967, and to demonstrate that state rules of property were always utilized to resolve disputes such as in the case at bar.

B. *Chronological Examination of Major Cases Prior to 1967*

The cases are numerous and entirely consistent wherein this Court held, prior to 1967, that state rules of property law govern questions concerning title to real property, including disputes involving beds and shores of navigable waters. No useful purpose would be served by attempting to cite all of those cases. It seems to be more productive to select some of the cases which appear to be of greater importance or clarity in demonstrating that riparian rights are to be determined by state rules of property law rather than by federal decisional law.

The cases so selected for review are presented in chronological sequence and an effort is made to show how each of the cases adds to the body of law as it existed at the time it was decided. This Court's language is quoted at length in those instances where it appears to be particularly appropriate to explain the rationale

underlying the decision or where it reveals the interpretation which this Court has placed on its earlier decisions.

1. *1876*: *Barney v. Keokuk*

Barney v. Keokuk, 94 U.S. 324 (1876), is the logical starting point for discussion because it is the first major case to shed meaningful light on riparian rights in navigable waters located above tide-water. To understand the significance of *Barney*, it is necessary first to explain how this Court's extension of federal regulatory power over inland navigable waters gave rise to confusion concerning riparian property interests, and how this confusion resulted in the *Barney* decision.

After the Federal Constitution was adopted, the thirteen Original States viewed tide-waters as navigable (subject to public use) and waters above the ebb and flow of the tide as non-navigable (privately owned), because this had been the law of England, as explained in Section III of this brief. Riparian rights were more extensive in non-navigable waters, but they applied to a lesser extent in navigable waters.

For a number of years this Court followed the English distinction between navigable and non-navigable waters in determining the reach of federal regulatory power under the Commerce Clause and the scope of admiralty jurisdiction under the Judiciary Clause (see, *e.g.*, *The Thomas Jefferson*, 10 Wheat. 428 (1825)). But this country had vast inland waters which were unaffected by the tides, which were physically capable of supporting navigation, and which were very valuable

for that purpose. As a consequence, it was not too long before this Court reversed itself and rejected the English "tidal test" of navigability (*The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1859)), and declared that all waters navigable-in-fact were navigable in law. Waters which were navigable-in-fact were those which were physically capable of supporting meaningful waterborne commerce; and such waters were subject to federal regulation as the "navigable waters of the United States" if they formed a navigable link in interstate or foreign commerce, but they were "navigable waters of the States" if they were navigable intrastate only (*The Daniel Ball*, 77 U.S. 557 (1870)).

These decisions, then, effectively extended federal regulatory power over navigation and admiralty jurisdiction to all inland waters which were navigable in interstate and foreign commerce; and also declared that inland, intrastate navigable waters were subject to state regulatory jurisdiction. This was clear enough for purposes of regulatory jurisdiction, but it created a good deal of confusion with respect to riparian property rights.

Two questions were of paramount importance: (1) how were riparian rights to be defined with respect to the inland navigable waters that previously had been deemed non-navigable under the "tidal" test; and (2) would such definition be supplied by local law or federal law?

These questions were answered by this Court in *Barney v. Keokuk*, 94 U.S. 324 (1876). The dispute

centered upon riparian claims along the shores of the Mississippi River in Iowa. The Court explained the confusion that had arisen as a result of the transition from the "tidal" test of navigability to the test of navigability-in-fact, and noted the unfortunate impact that this had had upon property rights in shorelands—and, most significantly, declared that these property rights must be defined and clarified under state law, and that each State was free to declare its own law. But the language of the Court speaks best for itself:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 id. 471. These cases related to tidewater, it is true; *but they enunciate principles which are equally applicable to all navigable waters.* And since this court, in the case of *The*

Gennessee Chief, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amendable to the admiralty jurisdiction, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.* The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. (94 U.S. at 338). (Emphasis added).

2. *1894*: ***Shively v. Bowlby***

Eighteen years after the *Barney* decision, the Supreme Court decided *Shively v. Bowlby*, 152 U.S. 1 (1894), and therein summarized how each of the Original States had adapted its common law rules of property to define riparian rights in shorelands of navigable waters. This case is particularly important because it emphatically concludes that state rules of property control all questions concerning riparian rights in shorelands, and because it reviews all of the earlier decisions of the Court to show that the Court had always adhered to that position. *Shively* has also been cited with approval dozens of times by the Court in subsequent decisions. Thus, this decision deserves some further explanation.

Bowlby had received from the State of Oregon a grant of certain lands situated between the high water mark and low water mark of the Columbia River. Shively claimed, through a predecessor in interest, under a prior patent issued by the United States while Oregon was still a Territory, asserting ownership "of all the tide lands and riparian rights and wharfing rights" in front of his patented land.

Thus, Bowlby claimed pursuant to a *subsequent* state grant and Shively claimed pursuant to a *prior* federal grant. Shively contended that the subsequent state grant could not cut off his riparian rights to tidelands and wharfing in the river. The question as to whether a subsequent state grant could limit or eliminate riparian rights claimed under a federal patent was squarely before the Court. The Oregon Supreme Court held that it could. This Court agreed, and in affirming the decree, observed that there had been such:

> . . . a diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject. (152 U.S. at 11).

The Court then reviewed at length the early common law of England, and then turned to the various adaptations those common law principles had received in the thirteen Original States, observing:

> The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only. (152 U.S. at 18).

The Court actually reviewed at some length the law of each of the thirteen Original States (Massachusetts, p. 18; New Hampshire, p. 20; Rhode Island, p. 20; Connecticut, p. 20; New York, p. 20; New Jersey, p. 21; Pennsylvania, p. 23; Delaware, p. 23; Maryland, p. 23; Virginia, p. 24; North Carolina, p. 25; South Carolina, p. 25; and Georgia, p. 25). Most of the Original States limited or denied ownership rights of riparians below high water mark.

Having thus evaluated and emphasized the differences in the law of the various States, the Court cautioned:

> The foregoing summary of the laws of the Original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another. (152 U.S. at 26).

The Court then devoted some twenty-five pages to a discussion of its own earlier decisions, pointing out that in each instance, where possible, it had ascertained and applied the law of the State involved (pp. 26-51). The Court, in affirming the Oregon Supreme Court, concluded:

> By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case. (152 U.S. at 57).

It should be noted that in *Shively* the Court found a "federal question" for jurisdiction only by virtue of the fact that the controversy required the construction of the effect and extent of an official grant (patent) by the United States. The Court concluded that the federal grant gave the grantee no rights below high water mark, and that any riparian rights arising by virtue of the patented land were to be determined by the law of Oregon.

McGilvra v. Ross, 215 U.S. 70 (1909), should be noted in connection with *Shively* (even though *McGilvra* is not one of the "major" cases selected for discussion). In *McGilvra*, certain private parties claimed riparian rights under federal patents to Lake Union and Lake Washington in the State of Washington. They

asserted "federal question" jurisdiction, contending that it would be necessary to construe the effect of federal patents, and further claiming that the State of Washington was taking their riparian rights without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution. The Court passed over the latter contention, pointing out that:

> . . . if the appellants did not derive the rights contended for by the patents, they have no rights to be impaired, even assuming, as we have assumed in this discussion, that the action of the State has proceeded far enough to be a trespass upon or an impairment of them. (215 U.S. at 76).

With respect to the other claim of a federal question, *i.e.*, that it would be necessary to construe the meaning and effect of federal patents, the Court pointed out that such would be true only "if prior decisions have not defined such rights and removed them from controversy." The Court summarized the holding in *Shively*, and concluded that there no longer was a federal question because:

> The issue was accurately presented [in *Shively*] between a title under a patent of the United States and one conveyed by a State in the exercise of its dominion over lands below high-water mark. The issue in the case at bar is exactly the same. (215 U.S. at 77).

The Court then considered the contention by the riparian patentees that *Shively* involved navigable waters affected by the tides, whereas Lakes Union and Washington were navigable waters not affected by the

tides, and concluded that non-tidal navigable waters fell within the same category as tidal navigable waters, and that the State of Washington had "full jurisdiction over the lands within its borders, including the beds of streams and other waters" (215 U.S. at 79). This being so, there was no "federal question" to be decided in construing the patents. The patents carried no riparian rights by their own force, and any such rights could only be created or recognized under the law of the State of Washington. Thus, concluded the Court:

> It follows from these views that the Circuit Court of Appeals rightly decided that the questions presented by the bill are no longer open to discussion, and that the Circuit Court was without jurisdiction. (215 U.S. at 80).

3. *1897*: *St. Anthony v. St. Paul*

Despite the thorough review of the earlier cases which the Court offered in *Shively*, much confusion and litigation persisted, and it was only three years later that the Court felt compelled to re-state its position that riparian claims in the shorelands of navigable waters were, and always had been, matters for determination under state law. This restatement came in *St. Anthony Falls Water and Power Company v. St. Paul Water Commissioners*, 168 U.S. 349 (1897). It should be remembered that *McGilvra* was not decided until 1909 (twelve years after *St. Anthony*), and at that later date the Court said riparian claims to shorelands no longer presented a federal question. In *St. Anthony* the riparian owners claimed riparian rights in the Mississippi River, which, they contended, were to be:

> . . . determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a state court, and that being property it cannot be taken away or impaired either by other private owners or by the State, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights, it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the state tribunal, the question is now open for review by this court. (168 U.S. at 357).

In response to those assertions by the riparian claimants, the Court gave this emphatic answer:

> . . . we are of the opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original States and those which were subsequently admitted to the Union under the provisions of the Federal Constitution. (168 U.S. at 358-59).

The above holding is crystal clear, and there would seem to be no point in dwelling at length on the cases reviewed by the Court to sustain the proposition that it had always been consistent in holding that state law controlled all aspects of riparian rights. But the Court did deem it sufficiently important to require a further review at that time, and for that reason this Court's own interpretation of the effect of its earlier decisions is extremely important. It is also important in view of

the cloud which *Hughes v. Washington*, 389 U.S. 290 (1967), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), have cast on source of law questions. So, for these reasons, the language of the Court in *St. Anthony* will be quoted at some length to show how the Court characterized its earlier decisions, and thus to show that—as rules of property law—it was fully and firmly confirmed that state law would govern all aspects of riparian right claims. The Court clearly wanted to lay the matter to rest and to prevent such questions from arising in the future.

The Court began its discussion with *Martin v. Waddell*:

> In *Martin v. Waddell*, 16 Pet. 367, it was held that, when the American Revolution was concluded, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. The action was ejectment for 100 acres of land covered with water in Raritan Bay in the township of Perth Amboy, in the State of New Jersey. The claim of the plaintiff was founded upon the charters of Charles II to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America, the land in controversy being within the boundaries of the charters and in the territory which now forms the State of New Jersey. Those letters patent, as construed by this court, conveyed to the Duke of York all the prerogatives and powers of government residing at the time of their execution in the King

of Great Britain, and passed from the jurisdiction of Great Britain to the people of each State after the Revolution. Although the question in that case arose in regard to lands covered with water in Raritan Bay, yet the principles upon which the case was decided have been stated to apply to the rights of the States in regard to all navigable waters within their jurisdiction. (168 U.S. at 359-60).

The Court then turned to *Pollard v. Hagan*:

> In *Pollard v. Hagan*, 3 How. 212, the question arose in regard to the rights of the State of Alabama in the shores of navigable waters and the soils under them within her limits. The sixth section of the act of Congress, passed on the 2d of March, 1819, 3 Stat. 492, c. 47, for the admission of the State of Alabama into the Union, provided: "That all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor, imposed by said State." It was held that the Government of the United States did not by reason of that enactment possess any more power over the navigable waters of Alabama than it possessed over the navigable waters of other States under the provisions of the Constitution, and that Alabama had as much power over those navigable waters as the original States possessed over the navigable waters within their respective limits. It was also held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively, and the new States had the same rights, sovereignty and jurisdiction over the subject as the original States. (168 U.S. at 360).

The Court then noted *Goodtitle v. Kibbe*:

> In *Goodtitle v. Kibbe*, 9 How. 471, the decision of this court in *Pollard v. Hagan, supra,* was referred to and affirmed, and it was said that, by the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of the navigable rivers *between high and low water mark*, and that after such admission Congress could make no grant of land thus situated. (168 U.S. at 361). (Emphasis added).

The Court considered *Barney v. Keokuk* to be particularly important, and explained the case in the following language:

> In *Barney v. Keokuk*, 94 U.S. 324, it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the States within which the lands were included. Mr. Justice Bradley, in stating the opinion of the court in that case, said (at page 338): "And since this court in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view *depended, as most cases must depend, on the local laws of the States in*

which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

It was also said by the same learned justice in speaking of the English idea of navigable waters being necessarily tide waters: "It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell,* 16 Pet. 367; *Pollard's Lessee v. Hagan,* 3 How. 212, and *Goodtitle v. Kibbe,* 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters." (168 U.S. at 361-62). (Emphasis as in opinion).

The Court next discussed *St. Louis v. Myers*:

> In *St. Louis v. Myers,* 113 U.S. 566, this court held that the act of March 6, 1820, 3 Stat. 545, admitting the State of Missouri into the Union, left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The act of Congress providing for the admission of Missouri into the Union, act of March 6, 1820, c. 22, 3 Stat. 545, and which declares that the Mississippi River shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law." (168 U.S. at 362).

Packer v. Bird was reviewed next:

> In *Packer v. Bird,* 137 U.S. 661, it was held, that as the highest court of California had decided that the Sacramento River being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court would accept that decision as expressing the law of the State. That case asserted the right of each State to determine the extent of the title and of the rights of the riparian owners in waters within the territory of the State. It was also stated that the Federal courts must construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, but that whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. It was further said that: "As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

It does not impair the efficacy of the grant or the use and enjoyment of the property by the

grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States. (168 U.S. at 363).

The Court then explained the effect of *Hardin v. Jordan*:

> In *Hardin v. Jordan*, 140 U.S. 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the State in which the lands lie, and that it depends upon the law of each State to what extent the prerogative of the State to lands under water shall extend. In the opinion, after stating that the title to the shore and lands under water is in the State and is regarded as incidental to its sovereignty, it is said: "Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce . . . . Sometimes large areas (of land) so reclaimed are occupied by cities and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and subjecting the lands to the necessities and uses of commerce" (citing cases). Continuing, the court said: "This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable rivers, as the Mississippi, the Missouri, the

> Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Mr. Justice Brewer, in his dissenting opinion (p. 402) in the above cited case, which was concurred in by Mr. Justice Gray and Mr. Justice Brown, agreed: "That the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnish the best and the final authority." And the dissent was based upon the theory that although the right of the State to determine this matter was not questioned in the prevailing opinion, there was, nevertheless, error committed by the majority of the court in refusing to follow a decision of the state court on the very question then under review, and in following instead thereof previous decisions of the state court inconsistent therewith. (168 U.S. at 363-64).

Next came *St. Louis v. Rutz*:

> In *St. Louis v. Rutz*, 138 U.S. 226, 242, cited in the dissenting opinion above referred to, it was said by Mr. Justice Blatchford, in delivering the opinion of the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois." (168 U.S. at 364).

Then, *Kaukauna v. Green Bay*:

> In *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co.*, 142 U.S.

254, Mr. Justice Brown, in delivering the opinion of the court, said at page 271: "It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels (citing cases). In *City of Janesville v. Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property." (168 U.S. at 364-65).

The Court finally concluded its review of the cases with its then-recent decision in *Shively v. Bowlby*:

> In *Shively v. Bowlby*, 152 U.S. 1, it was again said that the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions. It was also remarked that, upon the question, how far the title of the owner

> of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The suit was in the nature of a bill in equity brought to quiet title to lands below high-water mark in the city of Astoria, the question involving the rights in navigable waters as between the State and others. The opinion at page 57 states as follows: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court above referred to, the law of Oregon governs the case." The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the States to decide as to the character and extent of the riparian rights of owners upon navigable waters within such States. (168 U.S. at 365).

Having concluded the review of the earlier decisions, the Court summarized the essence of those decisions. In so doing, the Court noted that none of the prior cases had involved an ownership conflict between the State and riparian owners to flowing waters, as did the *St. Anthony* case, but pointedly noted that many of the cases did involve claims of the United States to shorelands, and said that the same result should follow—

i.e., that these matters should always be determined by state law:

> It is true that in these various cases the exact point in controversy in this case in regard to the rights of the State as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as between the United States or the State and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the right of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. *The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court.* The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review. (168 U.S. at 365-66). (Emphasis added).

4. *1905*: *Joy v. City of St. Louis*

To keep the chronological perspective, *Joy v. City of St. Louis*, 201 U.S. 332 (1906), was decided nine years after *St. Anthony*. The principal significance of *Joy* is that the dispute was over accretion land formed after the date of patent to a riparian owner along the Mississippi River (exactly the same situation as in *Hughes* and *Bonelli*). The Court first observed:

> The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises. It was said in *Blackburn v. Portland &c. Co.*, 175 U.S. 571, that "this court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question." The same principle was held in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, and also in *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U.S. 523. (201 U.S. at 341).

The Court then characterized the nature of the dispute, and ruled that state law controlled:

> In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed. There is no dispute as to the terms of the patent or of the acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts) shows that the controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, "which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13, 1812, and June 6, 1874, respectively."

Now, whether the land contained in the orig-

inal patent reached to the Mississippi river as its eastern boundary, under the distances called for by the patent, would be a question of fact, as was stated in *Sweringen v. St. Louis*, 185 U.S. 38, and whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. *St. Anthony Falls &c. Co. v. St. Paul Water Commissioners*, 168 U.S. 349, 359, and cases cited. In *Packer v. Bird*, 137 U.S. 661, it was held that while the Federal court would construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, *yet whatever incidents or rights attached to the ownership of the property conveyed by the United States bordering on a navigable stream* would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. To the same effect is *Shively v. Bowlby*, 152 U.S. 1. In the opinion in that case, at page 57, it is said: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States. (201 U.S. at 342-43). (Emphasis appears in opinion).

5. *1918*: *Arkansas v. Tennessee*

Arkansas v. Tennessee, 246 U.S. 158 (1918), decided thirteen years after *Joy*, is particularly pertinent to the case at bar because it dealt with an avulsion which exposed substantial segments of a riverbed and precipitated various claims to ownership of the exposed area (in the case now before the Court, of course, the primary dispute is over submerged and adjacent lands in the new channel). In any event, this Court made clear that local law must be applied, explaining that any conflict:

> . . . between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . (246 U.S. at 175).

6. *1926*: *United States v. Holt State Bank*

United States v. Holt State Bank, 270 U.S. 49 (1926), is of particular importance because the United States asserted a proprietary claim, as against private persons who claimed under the laws of the State of Minnesota, to the bed of Mud Lake. The fact that the United States was a party and a property claimant made no difference, and the Court applied Minnesota law in determining that the claims of the United States were without merit.

But the case is best explained by a preliminary ref-

erence to the Circuit Court's opinion (294 F. 161 (1923)). The sequence of events was as follows: (1) The United States issued patents to the uplands bordering on the meander line of Mud Lake; (2) then, certain litigation in the state court of Minnesota resulted in a decree that the dry lake bed belonged to the upland riparian patentees by virtue of the Minnesota doctrine of reliction; and (3) the United States thereafter surveyed the bed of the lake within the meander line and declared such land to be open for entry under the homestead laws (see 294 F. at 163). The basic claim of the United States was that the lake was never navigable; that as a result the State of Minnesota never acquired title to the bed thereof at statehood; and that the United States had thus retained title. The Circuit Court stated the issue in this fashion:

> Reduced to its lowest term, the case presents the single question: Is the United States the owner or are the homesteaders to whom it sold the lands bordering on Mud Lake in 1906 and subsequent years, and their successors in interest, the owners of the land in its bed. . . .
>
> It is determined by the law of the state where the land lies, where the waters are navigable, subject only to the paramount right of the United States to regulate and improve the navigation of those waters for commercial and public purposes. (Citing cases). (294 F. at 164).

The Circuit Court then observed:

> We turn then to the local law of the state of Minnesota to ascertain the rights and interests of homesteaders to whom the United States granted the lands on the shores of Mud Lake in the lands in the bed of the lake. (294 F. at 165).

The court concluded that under Minnesota law the dry lake bed was relicted land, and belonged to the private patentees who had received upland grants from the United States—and that the United States had no claim at all. The court then went on to conclude that the navigability of Mud Lake was also to be determined by state rather than federal law. (294 F. at 165-66). As will be seen, this latter conclusion was in error.

On appeal to this Court (270 U.S. 49), the Circuit Court's opinion was affirmed, although application of state law to determine navigability was disapproved:

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States, supra,* p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended. But not withstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable. (270 U.S. at 55-56).

The Supreme Court reviewed the evidence relating to navigability and concluded that Mud Lake was

navigable under the federal test. (270 U.S. at 56-57). And so the lower court's error was harmless in this regard.

However, with respect to the lower court's use of state law to resolve the reliction dispute between the United States and private claimants, this Court expressly affirmed the applicability of state law:

> We conclude that the State on its admission into the Union became the owner of the bed of the lake. It is conceded that, if the bed thus passed to the State, the defendants have succeeded to the State's right therein; *and the decisions and statutes of the State brought to our attention show that the concession is rightly made.* (270 U.S. at 59). (Emphasis added).

It was clear beyond any question that state law would be applied to resolve riparian claims and conflicts, even though the United States was a claimant.

The cases cited and quoted above present an accurate picture of the position which this Court always embraced prior to 1967. Then, when this Court decided *Hughes* in 1967 and *Bonelli* in 1973, it departed from the foregoing line of cases and applied federal decisional law to resolve riparian disputes in Washington and Arizona, respectively. This is ironic, in a way, because there are even more persuasive reasons why state law should control riparian conflicts in the Western United States, as explained in the following section of this brief.

C. *Federal Law Particularly Unsuited for Appropriation States*

1. *Preface*

In *Hughes* and *Bonelli* this Court was concerned that grantees of the United States might be denied certain riparian attributes of their uplands unless federal law was applied. This was erroneous for two basic reasons. First, as shown above, prior to 1967 this Court repeatedly held that federal grants and patents carried no riparian rights, and there are no riparian attributes of titles derived from the United States. And, second, many Western States do not recognize, and have never recognized, riparian rights. They have adopted in lieu thereof the "appropriation" system of determining rights in watercourses.

The appropriation system was designed to regulate diversions and uses of water, and was not directly concerned with questions relating to accretion, reliction, erosion and avulsion. However, since the appropriation system was entirely inconsistent with the riparian system, many Western States refused to adopt any part of the riparian system. A common result was that boundaries of navigable waters became fixed at statehood and did not fluctuate as a result of accretion and reliction (as was the law of Washington and Arizona, which the Court set aside in *Hughes* and *Bonelli*).

Once again, it is important to emphasize that whether federal grants and patents carry riparian rights was at one time a federal question, but that question

was answered in *Shively*. This Court had always, said, prior to 1967, that they did not. It always has been and remains a federal question to determine the boundaries of navigable waters at the date of statehood, so that the geographic measure of the state's entitlement under the equal footing doctrine can be ascertained. But after this is done, and after the States thus receive title, they are free to adopt the appropriation system and to refuse to recognize any aspects of the riparian system.

Several States could be selected to illustrate why riparian rights were never recognized, but Utah is the example selected for the following discussion. It will be shown not only that riparian rights have never been a part of the law of Utah, but also that Congress concurred in that result, and this Court confirmed it.

2. *Birth of the Appropriation System*

On July 24, 1847, Brigham Young and the Mormon pioneers entered the wilderness of the Great Salt Lake Valley, then a part of Mexico, but to become a part of the United States a year later (*Treaty of Guadalupe Hidalgo*, July 4, 1848, 9 Stat. 922). The Mormons were the first Anglo-Saxons to practice extensive irrigation in the United States. (Hutchins & Jensen, *The Utah Law of Water Rights*, p. 1 (1965)). On the very day of their arrival in the valley, history records that the Mormons commenced irrigation:

> On July 24th, 1847, William Carter, one of the members of Pratt's hundred, undaunted by the report of the first surveying committee, dedicated a tract of arid land to the Lord, cut a trench

> which would convey the waters of City Creek to the field, planted a few potato seeds, and prayed that the labors of the Saints might be blessed. The ground was so dry that it was necessary to irrigate it before ploughing it. (Brough, ***Irrigation in Utah***, John Hopkins Press, 1899).

Others followed suit. Less than one month later (August 22, 1847), at the first general conference of the Mormon Church, Brigham Young "moved that Edson Whipple receive an appointment to attend to the distribution of water over the ploughed lands." (Brough, *op. cit, supra*, at 17). The early institutional arrangements for administration of water rights in the Salt Lake Valley are summarized as follows:

> The fact that the original town sites were located on some living mountain stream, having a sufficient flow of water to supply the demands for irrigation in the fields, and for culinary purposes in the settlement, had an important effect on the customary law regulating the control and distribution of water. For before the system of priority of rights was introduced, the city and town authorities, by common consent, assumed the powers of controlling and distributing the water. When no regularly constituted council existed the entire community constituted a committee or directory, and employed a watermaster on an annual salary, or with the understanding that the distributor should be paid by levying an assessment on the ratio of acreage under cultivation. The duties of the watermaster consisted in equitably distributing the water among the users, deciding disputes as to the proportionate share of each user, and levying such taxes as were necessary to keep the canals and dams in repair. (Brough, *op. cit., supra*, at 17).

This, of course, constituted an effective repudiation of the common law regime of riparian rights. But the common law was of no relevance at that time, anyway, because, as observed above, all of this happened in what *at that time was a part of Mexico.*

When the United States acquired the Great Salt Lake Valley from Mexico in 1848, the appropriation system of water rights had already been created and riparian rights had been abolished (in fact, had never been in existence). Land had been allocated to the settlers, and these early possessory rights, both with respect to land and water, were recognized by the "State of Deseret" and the Territory of Utah, and formal land titles were ultimately issued by the United States. (See Kinney, *A Treatise on the Law of Irrigation and Water Rights*, 2d ed., vol. 4, §§2055-59 (1912); and Hutchins, *Mutual Irrigation Companies in Utah*, pp. 9-16 (1927). When first called upon to consider riparian rights, the Utah Supreme Court held that riparian rights had never been a part of Utah property law. *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 174 Pac. 852 (1918).

3. *Congressional Approval of Appropriation System*

The Territory of Utah was established September 9, 1850. (9 Stat. 453). Water rights litigation did not flourish in Utah because disputes between users were resolved by the administrative machinery created by the Mormon Church. But in other Western States the early cases demonstrated the confusion which arose between claims of appropriators and riparians. In *Irwin*

v. Phillips; 5 Cal. 140 (1855), the contest was between two gold miners, with one claiming riparian rights and the other claiming appropriation rights. The appropriator prevailed, since the court recognized the need for the appropriation system and the non-utility of the riparian system in the West. (Compare *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882)).

In the early cases the litigants almost always were "trespassers" on the public domain of the United States, and so they were not riparian "owners" in the true sense of the word. This cast some cloud on appropriation water rights, as to whether subsequent patentees of riparian land could then claim riparian rights which would prevail over established appropriation rights. Stated another way, the United States was the "riparian owner" since it owned the public domain, and the United States would thus own any riparian rights that might be recognized. Stability of appropriation water rights could only be achieved if the United States waived or relinquished its riparian rights in favor of the appropriation system.

Congress complied, because Congress favored settlement and development of the West. This congressional policy is manifest in numerous land grant acts, railroad grant subsidies, *etc.* But three acts are of particular relevance. In 1866 Congress passed a statute, essentially a mining act, which confirmed private rights in certain lands occupied by miners. Section 9 related to water:

That whenever, by priority of possession, right

> to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . . (14 Stat. 251, 253, 1866, as amended, 43 U.S.C. §661).

Four years later, Congress passed another statute which said that land grants theretofore or thereafter executed were to be subject to all water rights recognized by Section 9 of the 1866 Act, as quoted above. (See 16 Stat. 217, 218, 1870, as amended, 43 U.S.C. 661). The third statute was the Desert Land Act of 1877, which provided that 'all surplus water over and above . . . actual application and use . . . shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." (19 Stat. 377, 1877, as amended, 43 U.S.C. §321). There was also a provision to protect the federal regulatory authority over navigation, but the clear congressional intent was to waive or relinquish the United States' riparian rights in favor of the appropriation system, so that federal patentees would have no riparian rights in appropriation States.

Riparian rights, where recognized, are appurtenant to the land and pass with title to the land. But the foregoing statutes abolished riparian rights in federal lands in the West, and patentees claiming through the United States cannot claim riparian rights to water use by virtue of the patents. If they have riparian rights at

all by virtue of their ownership of riparian land, such rights are created under the water laws of the respective States. But all of this might not have been entirely clear until 1935, when this Court spoke, as noted below.

4. *Supreme Court Clarification and Confirmation*

The various States in the West applied their own interpretations to the federal statutes mentioned above. Oregon ruled that the Act of 1877 abolished the common law doctrine of riparian rights, except for domestic and stock watering purposes, but held that riparian rights did attach to land patented prior to 1877. (*Hough v. Porter,* 51 Ore. 318, 98 Pac. 1083 (1909)). South Dakota reached essentially the same result. (*Cook v. Evans,* 45 S.D. 31, 185 N.W. 262 (1921)). But California and Washington construed the Act narrowly, restricting it to Desert Land entries. (*San Joaquin & Kings River Canal & Irr. Co. v. Worswick,* 187 Cal. 674, 203 Pac. 999 (1922); *Still v. Palouse Irrigation & Power Co.,* 64 Wash. 606, 117 Pac. 466 (1911)). Similar inconsistencies existed among other States. There was a vital need for clarification by the Supreme Court with respect to the exact meaning and effect of these federal statutes.

That clarification came in 1935. There had been some dictum by the Court in 1903 to the effect that the States were free to reject riparian water rights doctrines under these statutes. (*Gutierres v. Albuquerque Land and Irrig. Co.,* 188 U.S. 545, 556 (1903)). But the dispositive pronouncement of this Court came in *California Oregon Power Co. v. Beaver Portland Cement*

Co., 295 U.S. 142 (1935), where Justice Sutherland, speaking for a unanimous Court, explained the source of state power to create appropriative rights in water on federal land; and where it was made clear that the 1866, 1870, and 1877 acts served to strip federal patentees of any claim to riparian rights.

The Court desired to validate and confirm the property rights that had been created under state law, despite the conflicting interpretations which the state courts had placed on the federal legislation, and so it was held that the States were free to adopt their own systems of water law, accepting or rejecting whatever principles of riparian rights they wished to accept or reject.

With this freedom, some States adjusted their rules of law to better suit their local needs, realizing that no uniform federal standard was to be imposed upon them. South Dakota, for example, overruled *Cook v. Evans*, *supra*, and held that riparian rights could attach in that State to patents issued after 1877 (*Platt v. Rapid City*, 67 S. Dak. 245, 291 N.W. 600 (1940)).

VI. *STATE LAW REQUIRED BY FEDERAL STATUTES*

Congress has specifically declared that all questions relating to the ownership of the beds and shorelands of inland navigable waters shall be determined by state law. This can be illustrated by reference to the Submerged Lands Act and the Judiciary Act.

A. *The Submerged Lands Act*

Congress enacted the Submerged Lands Act to confirm in the States title to the beds and shorelands of all inland navigable waters and to a three-mile belt of the bed of the marginal sea, as discussed in some detail in Section IV of this brief, *supra*. So far as relevant here, the section which confirms title in the States declares that:

> It is determined and declared to be in the public interest that (1) title to and ownership of the *lands beneath navigable waters* within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources *all in accordance with applicable State law* be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto *under the law of the respective States in which the land is located*, and the respective grantees, lessees, or successors in interest thereof. *43 U.S.C. 1311 (a)*. (Emphasis added).

The two separate declarations that state law shall govern all ownership questions are clear enough. What might need clarification, however, is the phrase "lands beneath navigable waters." That clarification is provided by Section 1301(a) (1) of the Act:

> The term "lands beneath navigable waters" means—all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the

> laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction.

Thus, "lands beneath navigable waters" includes all lands within the ordinary high water mark of the inland navigable waters located within the respective States. Congress clearly provided that ownership and management of these lands shall be "in accordance with applicable State law," and that the claims of the States and all other persons shall be determined by "the law of the respective States in which the land is located." Thus Oregon law governs the present dispute. Nothing could be clearer.

B. *The Judiciary Act*

Congress has also provided for application of state law by virtue of the judiciary act. The original judiciary act provided that state law should apply in all cases except where the Federal Constitution, treaties or statutes required construction:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in all cases where they apply. *Act of Sept. 24, 1789, 28 U.S.C. 725.*

***Swift v. Tyson*, 16 Pet. 1 (1842)**, mistakenly interpreted this statute as applying essentially to state statutory law only, except as to "rights and titles to things having a permanent locality, such as the rights and titles to real estate." In the latter event, state decisional (as well as statutory) law applied. But ***Erie v. Tompkins*, 304 U.S. 64 (1938)**, said the *Swift* view was erroneous because it was too restrictive, and that state *decisional* as well as *statutory* law governed all cases except where it was necessary to construe a federal constitutional provision, treaty or staute. In *Erie* the Court made clear that the question was not one of statutory construction, but one of adhering to constitutional requirements:

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. *304 U.S. 64, 78 (1938).*

And, further, that:

> . . . in applying the [*Swift v. Tyson*] doctrine, the Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States. *304 U.S. 64, 79-80 (1938).*

The constitutional implacations of source of law questions are explained in Section VII of this brief, *infra*, and the subsequent erosion of the *Erie* doctrine is noted. For present purposes, two observations are important. First, even under the *Swift* doctrine, state statutory and decisional law was applied to govern ques-

tions relating to title to real property. Second, Congress amended the judiciary act ten years after the *Erie* decision (*Act of June 25, 1948, 62 Stat. 944, 28 U.S.C. 1652*), restated the essence of Section 24 of the original judiciary act, and fully concurred in the *Erie* declaration that local law should apply:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in all cases where they apply.

The above statute is still in force. Since the present conflict concerns property rights in Oregon, and since this dispute requires no judicial construction of any provision of the Federal Constitution, or of any federal treaty or statute, it is clear that the "laws of the several states" apply, and "shall be regarded as rules of decision in civil actions in the courts of the United States."

VII. *STATE LAW REQUIRED AS A CONSTITUTIONAL NECESSITY*

The question whether federal or state decisional law should be applied to resolve the present property dispute before the Court may have serious constitutional implications.

As a basic premise, federal decisional law should apply only to the extent that it is necessary for the

Court to construe the United States Constitution or a federal treaty or statute.

Article III, Section 2, of the United States Constitution is the sole source of the judicial power conferred upon the United States by the thirteen Original States, and includes:

(a) All cases arising under the constitution, laws and treaties of the United States;

(b) Admiralty and maritime jurisdiction;

(c) Cases involving certain parties, such as ambassadors, consuls, public ministers; controversies to which the United States is a party; and controversies between two or more states, between citizens of different States, *etc.*

The first category mentioned above is the one here involved, and is the constitutional basis for both "federal question" jurisdiction and "federal questions" for source of law. The specific language of Article III, Section 2, relating to federal questions is:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority.

At issue is whether questions of title to real property underlying or adjacent to an inland navigable river are property matters to be resolved by federal or by state law. It does not appear that any provision of the Federal Constitution or any federal treaty or staute requires construction by the Court.

But, even assuming that some provision of a federal statute was involved (such as a grant or patent issued pursuant to a federal statute), then what is the test of the "construction" which creates a federal question? In *Shulthis v. McDougal*, 225 U.S. 561 (1912), various parties claimed title to lands under certain laws of the United States, and in denying federal jurisdiction for want of a substantial federal question, the Court made the following observation:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. (225 U.S. at 569).

Even when source of title might be dependent upon the effect of a treaty, there is no federal jurisdiction based on a substantial federal question unless the construction given the treaty will determine the outcome of the case. In *Romie v. Casanova*, 91 U.S. 379 (1875), a writ of error to the Supreme Court of California was dismissed for lack of jurisdiction where the city of San Jose held title to certain land, even though it was not clear whether such title existed solely by virtue of rights acquired before the cession of California to the United

States, or whether the Treaty of Guadalupe Hidalgo and certain federal statutes served to vest or confirm title:

> The title of the city was not questioned, even if it depended upon the treaty of Guadalupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it. (91 U.S. at 381).

A very substantial body of case law follows this view: *Colorado Central Mining Co. v. Turck*, 150 U.S. 138 (1893); *Florida Central & P. Railroad Co. v. Bell*, 176 U.S. 321 (1900); *Gold-Washing and Water Co. v. Keyes*, 96 U.S. 199 (1877); *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *McStay v. Friedman*, 92 U.S. 723 (1875); and *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900).

In *Blackburn v. Portland Gold Mining Company*, 175 U.S. 571 (1900), the Court reviewed a number of its earlier decisions, concluded that there was no federal question and thus no jurisdiction in a title dispute involving mining locations made under federal statutes, unless the controversy hinged on the interpretation of such statutes, and tersely observed:

> This court has *frequently* been *vainly* asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question. (175 U.S. at 579) (Emphasis added).

The foregoing cases illustrate how "federal questions" have been construed by the Court in litigation involving title to real property. How are these cases related to the constitutional grant of judicial power in all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority?"

A page of history will sharpen this constitutional focus. Following the adoption of the United States Constituion, the first judiciary act provided that:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. Act of Sept. 24, 1789, 28 USC §725.

Swift v. Tyson, 16 Pet. 1 (1842), involved a question of commercial law where a bill of exchange had been taken for value, without notice of any defenses to payment, and before maturity; and it was held that federal commercial and contractual law would apply to determine the rights of the parties. Even under this doctrine, however, the court thought it clear that "rights and titles to real estate" were matters to be determined by local law. The court concerned itself primarily with *congressional intent* in the enactment of the judiciary act, rather than with constitutional grants and limitations, holding that the act was to be limited:

> . . . to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, *and to rights and titles to things having a permanent locality, such as the rights and titles to real estate*, and other matters immovable and intraterritorial in their nature and character. (16 Pet. at 18) (Emphasis added).

The *Swift* doctrine received widespread criticism, perhaps reaching its greatest intensity in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), where Justice Holmes, dissenting and expressing criticism of the *Swift v. Tyson* doctrine, said at page 532:

> If I am right the fallacy of the *Swift v. Tyson* holding has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.

The *Swift* doctrine experienced its demise in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The facts before the Court in *Erie* required only a determination as to whether federal or state decisional law should apply in federal courts to assess liability for negligence in a tort action, in the absence of an state or federal statute.

The Court could have limited its decision to those facts, either preserving or gradually eroding the *Swift* doctrine. But Mr. Justice Brandeis, speaking for the court, and after reviewing the disservice of *Swift* in nearly a century of experience with it, concluded that preservation or rejection of that doctrine was not a matter of judicial discretion or statutory construction,

but that the entire doctrine had to be repudiated as a matter of constitutional necessity:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. (304 U.S. at 77-78).

The Court then went on to explain that:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. (304 U.S. at 78).

The statute under review in *Erie* was not invalidated, merely reconstrued:

> In disapproving that doctrine we do not hold unconstitutional §34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine, this Court

> and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States. (304 U.S. at 79-80).

In *Erie* the Court seemed to be persuaded toward its holding by a law review article published in 1923, (Warren,[1] *"New Light on the History of the Federal Judiciary Act of 1789,"* 37 Harv. Law Rev. 49 (1928)), wherein the early history of Section 34 of the Judiciary Act was reviewed (including earlier drafts of the statute prior to its enactment, and other pre-enactment documents), and where it was concluded by the author that (1) the very purpose of the statute was to assure that the rules of decision as well as the statutes of the States would apply in federal courts where no federal question was involved; and (2) if the Court in *Swift* had been aware of the early history of the statute, that doctrine never would have resulted. The importance placed by the Court on this article is reflected in the following language from the opinion:

> The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given §34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all

---

[1]Charles Warren was later appointed Special Master in **United States v. Utah**, 238 U.S. 64 (1931).

> matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written. (304 U.S. at 72-73).

A number of cases following *Erie* clearly confirmed that all lower federal courts in diversity cases were to apply the law of the respective States (*Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Six Companies v. Joing Highway District No. 13*, 311 U.S. 180 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); and that the mandate applied to cases in equity as well as at law (*Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Ruhlin v. New York Life Inc. Co.*, 304 U.S. 202 (1938)).

It is not now contended that *Erie* has remained entirely intact, or that there is no federal common law. What is contended, however, is that *Erie* rejected *Swift* as an unconstitutional invasion of the rights of the States to apply their own local law when a substantial federal question was not involved. And, even under *Swift*, title disputes concerning real property were always resolved by local law. Ironically, in the same year that *Bonelli* was decided, this Court observed that "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

So the argument really boils down to this: If some sort of federal common law is to be applied in the present case, then the result is not only to reject *Erie* totally, but it even requires advancing the use of federal common law far beyond the *Swift* doctrine. In *Erie*, this Court said that *Swift* was an unconstitutional invasion of the right of the States to apply their local rules of property law—surely the Court should not now reject *Erie* and return to the repudiated doctrine of *Swift*.

VIII. *THE FIRST DEPARTURE: HUGHES v. WASHINGTON IN 1967*

A. *Preface*

In *Hughes v. Washington*, 389 U.S. 290 (1967), this Court held for the first time that federal decisional law must be applied to resolve a riparian property dispute. Before turning to that decision, it is necessary to examine the route traveled by the Court to reach the *Hughes* result. As will be seen, the *Hughes* decision was based on a circuit court's mistaken view of *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). Therefore, it seems appropriate first to consider what the *Borax* case actually involved and what this Court actually held.

B. *Borax v. Los Angeles in 1935*

It was a quote taken out of context from the language of *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), which apparently caused this Court in 1967 to depart from prior precedent under

the impression that *Borax* was supporting authority for the decision in *Hughes*. As a matter of plain fact, nothing could be farther from the truth. That rather famous quote will be noted in a moment, but first it may be helpful to explain what *Borax* really held, and why that case is fully consistent with the earlier pronouncements of the Court—as reviewed above.

In dispute was a tract of land in Los Angeles Harbor. Los Angeles claimed pursuant to a legislative grant from the State of California; Borax claimed as a successor in interest to a patentee of the United States. The nature of the conflict is of critical importance. Borax claimed under a federal patent which specifically described and conveyed a surveyed lot containing "eighteen acres, and eighty-eight hundredths of an acre" (296 U.S. at 13), but Los Angeles contended that the patent erroneously included state-owned tideland which rightly belonged to the City under its grant from the State.

Thus, the question was *not* whether any riparian rights attached to land conveyed by federal patent; but, rather, *whether the federal patent, itself, was valid.* This, of course, has always been a federal question (see, *e.g.*, *Wilcox v. Jackson*, 38 U.S. 498 (1839)).

A preliminary question was whether the validity of the patent could be collaterally attacked. The federal district court held that it could not, because the survey, the plat, and the patent were within the exclusive statutory jurisdiction of the General Land Office, and so the trial court thought the administrative action

was conclusively binding on the City of Los Angeles, the State of California and the United States (296 U.S. at 14). The circuit court disagreed; this Court then granted certiorari. With respect to the finality of the acts of the General Land Office, this Court first observed that tidelands were owned by the State, and the United States was without power to convey lands that it did not own:

> It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. (296 U.S. at 16).

Therefore, this Court concluded that the federal statutes which conferred authority on the General Land Office were intended to apply only to the "public lands" of the United States, and could not be construed to authorize the Land Office to survey, sell and patent land that the United States did not own:

> Obviously these laws had no application to lands which belonged to the States. Specifically, the term "public lands" did not include tidelands. (296 U.S. at 17).

And, further, that:

> The question before us is not as to the general authority of the Land Department to make surveys, but as to its authority to make a survey, as a basis for a patent, which would preclude the State or its grantee from showing in an appropriate judicial proceeding that the survey was inaccurate and hence that the patent embraced

land which the United States had no power to convey. (295 U.S. at 18).

The patent was thus valid only to the extent that it conveyed federally-owned upland, and was invalid to the extent that it purported to convey state-owned tideland. The question, then, was *whether the tract in question was upland or tideland.* And that question could only be answered in light of some definition of the federal boundary to mark the extent of the uplands, to distinguish them from the state-owned tidelands. There was some question as to which high-tide line should be used, whether it should be the "mean high-tide line" or the line of the "neap tides." (296 U.S. at 21-22). After some discussion, this Court concluded that the correct boundary would be the mean high-tide line over a period of 18.6 years, explaining:

> In determining the limit of the federal grant, we perceive no justification for taking neap tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides. (296 U.S. at 26).

The measure of the high-tide line is not important for present purposes. But what is important—vitally important— is that the measure of the high-tide line boundary is clearly a federal question. As the Court noted in the above quote, the measure of the boundary

is necessary in "determining the limit of the federal grant." It was simply a matter of determining the validity of a federal act. And this was the very point which the Court emphasized when it used the following language (which was later to be relied on by this Court in *Hughes*):

> Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer v. Bird*, 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 87; *United States v. Holt Bank*, 270 U.S. 49, 55, 56; *United States v. Utah*, 283 U.S. 64, 75. (296 U.S. at 22).

But this observation was merely a preface to this Court's relevant holding in *Borax* with respect to riparian rights in tidelands. Indeed, in the very next sentence the Court routinely declared that state law applied to determine riparian rights in shorelands adjacent to uplands:

> Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney v. Keokuk*, 94 U.S.

> 324, 338; *Shively v. Bowlby, supra*, p. 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 63. (296 U.S. at 22).

Thus, when the case was re-tried in the federal district court everyone understood that state rules of property law were to be applied to resolve ownership claims in the tidelands. In that decision, 20 F.Supp. 69 (S.D. Cal. 1937), the State law of estoppel was found to be controlling; the decision was affirmed on appeal (102 F.2d 52 (9th Circ. 1939)); and this Court denied certiorari (307 U.S. 644 (1939)).

Borax is completely consistent—in rationale and *ratio decidendi*—with the earlier decisions of the Court.

C. *Prelude to Hughes: U.S. v. Washington in 1961*

Simply stated, *United States v. Washington*, 294 F.2d 830 (9th Circ. 1961), involved a dispute between the State of Washington and the United States to accretions that had formed along the Pacific Ocean after the date of statehood. The district court applied the state property law of Washington, but the circuit court reversed, acting on the mistaken impression that *Borax* required the application of federal decisional law:

> In urging that federal law controls, the Government relies primarily upon the holding in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9. In that case Borax Consolidated, claiming as upland owner under a federal patent, brought an action to quiet title to land alleged to be tideland situated

> in the inner bay of Los Angeles Harbor. It was apparently agreed that the company's land extended to the high-water mark, but there was controversy as to how this mark was to be determined. Declining to be bound in its determination by the definition of the term "ordinary high-water mark" under California law, the court said: "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer v. Bird, 137 U.S. 661, 669, 670 [11 S.Ct. 210, 34 L.Ed. 819]; Brewer-Elliott Oil [& Gas] Co. v. United States, 260 U.S. 77, 87 [43 S.Ct. 60, 67 L.Ed. 140]; United States v. Holt [State] Bank 270 U.S. 49, 55, 56 [46 S.Ct. 197, 70 L.Ed. 465]; United States v. [State of] Utah, 283 U.S. 64, 75 [51 S.Ct. 438, 75 L.Ed. 844]. Rights and interests in the tideland which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338 [24 L.Ed. 224]; Shively v. Bowlby, supra [152 U.S. 1], [at] p. 40 [14 S.Ct. 548, 38 L.Ed. 331]; Hardin v. Jordan, 140 U.S. 371, 382 [11 S.Ct. 808, 35 L.Ed. 428]; Port of Seattle v. Oregon & Washington R. Co. 255 U.S. 56, 63 [41 S.Ct. 237, 65 L.Ed. 500]." 296 U.S. at page 22, 56 S.Ct. at page 29.

No question of accretions was involved in Borax, the problem being the ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent. But the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the

upland. *If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such a title, "involves the ascertainment of the essential basis of a right asserted under federal law."* (294 F.2d at 832). (Emphasis added).

The last three sentences quoted above were in direct and absolute conflict with all of the prior decisions of this Court. It has been shown that this Court had repeatedly declared and affirmed that federal patents do not carry any "attributes" or ownership rights in state-owned tidelands and shorelands—and that if any such riparian rights are to be recognized, they are to be defined solely in accordance with state law. It will be recalled, for example, that *McGilvra v. Ross*, 215 U.S. 70 (1909), held there was no federal question and thus no federal-question jurisdiction, when the dispute concerned lands situated below the high water mark at statehood, because it had been clearly held that federal patents carried no rights in such lands; and in *Blackburn v. Portland Gold Mining Company*, 175 U.S. 571 (1900), this Court said that it had "frequently been vainly" asked to find a federal question when one of the parties to the dispute derived his title directly under an act of Congress. *Joy v. City of St. Louis*, 201 U.S. 332 (1906), clearly held that accretions were solely matters of local law; and *United States v. Holt State Bank*, 270 U.S. 49 (1926), emphatically held that relictions were solely matters of local law. Numerous other decisions of this Court to the same effect have already been discussed above, and the circuit court cited and purported to distinguish some of them (294 F.2d 832-34). The distinctions therein offered are superficial, unrealistic, and totally inaccurate. But this Court denied certiorari (369 U.S. 815 (1962)). Charitably stated, the circuit court's opinion is based solely on a grievous misconstruction of the *Borax* case.

D. *The Hughes v. Washington Decision in 1967*

This Court largely followed the circuit court's opinion in *U.S. v. Washington* when, in 1967, it decided *Hughes v. Washington*, 389 U.S. 290 (1967). The conflict was over accretions which had formed on the beach of the Pacific Ocean. The State of Washington claimed ownership under state law; and Mrs. Hughes, as a successor in interest to a federal patentee, claimed under federal law as announced in the circuit court's opinion in *U.S. v. Washington*. The Court accepted the circuit court's mistaken view of *Borax*, and, as a result, said:

> We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood is the owner of these accretions (389 U.S. at 291).

In creating a "federal common law" to adjudicate rights to accretions formed on the beach, this Court departed from an unbroken line of cases that had been the controlling law for a century. Typical of this Court's earlier, uniform and consistent pronouncements is the following:

> . . . we are of the opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days . . . . (*St. Anthony Falls Water Power Company v. St. Paul Water Commissioners*, 168 U.S. 349, 358 (1897)).

Despite the many cases reviewed in Section V.B. of this brief, this Court in *Hughes* indicated that it had decided no prior cases to serve as a precedent to determine whether state or federal law should apply to determine the riparian rights (accretions) of Mrs. Hughes:

> While the issue appears never to have been squarely presented to this Court before, we think the path to decision is *indicated* by our holding in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that
>
> [t]he question as to the extent of this federal grant that is, as to the limit of the land conveyed or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U.S. at 22. (389 U.S. at 292).

The Court did not quote the following sentence in *Borax*:

> Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. (296 U.S. at 22).

Nor did this Court view as significant the fact that the lands in dispute were tidelands at the date of Washington's admission into the Union (so that the State undeniably held title at that time), but since had received deposits by the ocean so as to raise the land above the line of the average high tides. Under a careful reading of *Borax*, it is entirely clear that Washington law would have applied to determine whether, or to what extent, Mrs. Hughes as a riparian owner would be accorded any riparian rights in lands that were tidelands at statehood. But the *Borax* decision has been fully reviewed above, and need not be further argued here.

This Court in *Hughes* also cited *United States v. Oregon*, 295 U.S. 1 (1935), in support of its holding, but that case was not at all in point. It simply held that an Oregon statute could not divest the United States of title to land which had always remained in federal ownership (the bed of a non-navigable lake) and which had been reserved by the United States for a bird refuge (389 U.S. at 292). The Court then cited *United States v. Washington*, which is the Ninth Circuit Court's opinion discussed above. The Court cited no other authority in support of its holding that federal law should govern ownership of the accretions. It failed to note, for example, that *Joy v. City of St. Louis*, 201 U.S. 332 (1906), was totally in point but held the exact opposite. In short, this Court failed to cite any of its

earlier decisions that were in point—except *Borax*, and *Borax* was mis-read as holding the exact opposite from its true holding. And this Court thus indicated that it thought it was following its earlier decisions.

It is easy to see how the misuse of *Borax* by the Ninth Circuit laid the foundation for this Court's decision in *Hughes*. The State of Washington, which lost the *Hughes* case, did not explain the actual holding of *Borax* when it filed its brief in *Hughes*. In fact, the State virtually conceded that *Borax* controlled, thus accepting the erroneous view of *Borax* which was adopted by the circuit court. The Supreme Court noted as much:

> Recognizing the difficulty of distinguishing *Borax*, respondent urges to us to reconsider it. *Borax* itself, as well as *United States v. Oregon*, *supra*, and many other cases makes it clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. (389 U.S. at 292-93).

Of course, *Borax* is not only easy to *distinguish* from *Hughes*, but in point of plain fact it need not be "distinguished" at all, since it doesn't even come close to Hughes—it held the exact opposite. And there was no "dispute over title to lands owned by the Federal Government," as the Court indicated. Federal law applies when *title* to the lands *in dispute* never passed from Federal Government, and are still *owned by the Federal Government*. But in fact the Federal Government had *parted with title* to the tidelands upon Washington's admission into the Union, and the question was

whether state-owned tidelands had been converted into private riparian ownership by the common law principle of accretion. Thus, *as the Court correctly noted, there was no prior Supreme Court decision which held that federal law should answer that question.* But there were many uncited cases to the contrary. The Court said that *Borax* "indicated" the "path to decision" in *Hughes*. It is respectfully submitted that *Borax* contained no such indication; and that there were dozens of other decisions of the Supreme Court which clearly held that state law should govern the question in *Hughes*.

It might be noted that Mr. Justice Stewart concurred in the *result* of *Hughes*, not because he believed that federal decisional law applied to determine ownership of accretions, but because he thought that the State of Washington had changed the state law relating to accretions—and had applied the change retroactively to divest Mrs. Hughes of relictions which she had earlier owned under state law. This, concluded Justice Stewart, was a denial of constitutional due process. And that was the essential basis for his concurrence. With respect to the source of law question, Justice Stewart aptly observed:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the

> United States somehow immune from the changing impact of these rules. [Citations omitted]. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. (389 U.S. at 295).

Justice Stewart's concurring opinion was sound.

As a final note on the source of law aspect of *Hughes*, it is interesting to observe that when the Court searched to find cases which explained the substance of the "federal law" of accretion, it found only three to discuss. And those cases are, at best, dubious authority for a federal common law of accretion. Except for the Ninth Circuit's erroneous opinion in *United States v. Washington*, no case had purported to create federal rules of property law. The absence of such cases is explained, of course, by the fact that accretion and reliction claims had always been held to be subject to state rules of property law.

IX. *THE SECOND DEPARTURE: BONELLI v. ARIZONA IN 1973*

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court applied federal decisional law to determine that certain lands adjacent to the Colorado River, and formerly a part of the state-owned bed of the River, became the property of the private upland owner under the doctrine of accretion when the River

was re-channeled so that the water level was permanently below the disputed tract.

In deciding to apply federal decisional law, the Court employed a more sophisticated rationale than that utilized in *Hughes*. In *Hughes*, it will be recalled, the primary justification for applying federal law was that Mrs. Hughes' predecessor-in-interest had acquired title by patent from the United States, and it was said that such federal title carried with it certain riparian attributes, including the right to future accretions. Without disowning *Hughes*, the Court in *Bonelli* elected to redefine the nature and measure of the title which the States receive to the beds of their navigable waters at statehood.

In so doing, it was decided that the States receive a title that is "defeasible" by the doctrine of accretion (and, presumably, by the doctrine of reliction). Pertinent extracts from the opinion will illustrate the rationale of the Court. It was first recognized that in times past state rules of property law controlled ownership questions relating to the beds of navigable waters and adjacent lands, and the Court said that it still adhered to that view, but that the true issue was the nature of the original title received by the State:

> Having concluded that title to the subject land was thus vested in the State as a matter of settled federal law, the state courts determined that local law controlled whether petitioner, as a riparian owner had any interest in the land thereafter. As the Court said in *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918): "[I]t is for the States to establish for themselves such rules of

property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them . . . ."

We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters. (414 U.S. at 319-20).

The Court then cited *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), in support of the last sentence quoted above. As has been seen, however, *Borax* is no authority for a judicial re-definition of states' rights under the concept of constitutional equal footing. The Court then attempted to distinguish *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877); and *Scott v. Lattig*, 227 U.S. 229 (1913). The rationale for distinguishing these cases was that, while they stood for the proposition that state law controlled the nature and extent of riparian rights, the Court was confronted with quite a different question, *i.e.*, the nature and extent of the original state title:

> The present case, however, does not involve a question of the disposition of lands, the title to which is vested in the State as a matter of settled federal law. The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a "right asserted under federal law." (*414 U.S. at 320-21*).

Thus, the "right asserted under federal law" was not any attribute of Bonelli's title as derived through a federal grant or patent, but was in fact the State's title acquired at statehood under the equal footing doctrine. Even though Arizona's title was unquestioned to the extent that the disputed tract had been a part of the riverbed, this Court perceived a federal question because under Arizona law the state title acquired under the equal footing doctrine could not be divested by the common law doctrine of accretion or reliction.

In other words, this Court said, in substance and effect, that Arizona was claiming continued ownership on the theory that its title was not defeasible, and that, it was said, begged the question because the very issue was whether the state's title was defeasible—and the answer to that question was dependent upon a construction of the meaning and effect of the equal footing doctrine. Thus, Arizona was asserting a right "under federal law" that required interpretation by the Court.

The Court then concluded that States receive only a defeasible title to the original beds and shores of navigable waters located above ordinary high water marks and that Arizona's title to the tract in question was di-

vested by the federal common law of accretion. The Court justified this result, in large part, on the fact that the disputed tract was high and dry, and no longer enjoyed any meaningful relationship to the River. Thus, concluded the Court, the important public purposes associated with the public trust over navigable waters was no longer present, and there were no public interest factors in favor of sustaining ownership in the State. (See 414 U.S. at 321 *et seq.*). There was no suggestion, however, that the bed of the Colorado River within the ordinary high water mark was defeasible.

X. *CONCLUSION*

It has been seen that this Court and the Congress have always been consistent in recognizing and confirming state ownership of the beds and shorelands of inland navigable waters. Even the recent decisions of this Court in ***Hughes*** and ***Bonelli***, the wisdom of which is questioned in this brief, steadfastly confirmed such state ownership. Those decisions simply held that the land there involved was *no longer a part of the beds or shorelands* of the navigable waters under scrutiny, and those cases are no precedent for fashioning federal decisional law to resolve property disputes to submerged lands or exposed shores located within the ordinary high water mark of inland navigable waters or the line of average high tides on tidal waters.

However, this brief is critical of those cases because they devised rules of federal common law to resolve riparian property disputes—whereas prior to 1967

this Court had always held that state law controlled such disputes. It is believed that the case now before the Court is only one of hundreds of cases that will prove to be the legacy of the ***Hughes*** and ***Bonelli*** decisions, and that a federal common law of riparian rights will have to be developed in great detail if this Court continues to adhere to those decisions. Those decisions are not only unsound as a matter of law, but they threaten to burden the federal courts with a never-ending stream of property disputes properly within the province of the respective States.

If this Court had established a doctrine of "defeasible title" at an early date, before property rights vested in the beds of navigable waters and adjacent uplands, then everyone would have understood the nature, basis and measure of their rights. But the Court did not do that. From the beginning of the Union until the *Hughes* decision in 1967, the decisions of this Court were clear to the effect that the States obtained complete title to the beds of their navigable waters and that state law would determine whether, and to what extent, riparian rights would be recognized. How, for example, can *Hughes* and *Bonelli* possibly be reconciled with *Joy v. City of St. Louis*, 201 U.S. 332 (1906), or any number of similar cases to the same effect, as discussed above.

In 1967 the *Hughes* decision displaced state law, *for the first time*, in those cases where one of the claimants could trace his title back to an original federal grant. Then, in 1973, *Bonelli* found a more pervasive means of displacing state law by declaring, *for the first*

time, that Arizona's title under the equal footing doctrine was defeasible. Thus, property rights that vested under state law prior to 1967, or prior to 1973, might be divested without compensation under the rationale of either the *Hughes* or *Bonelli* decisions.

Assume that the facts in *Hughes* and *Bonelli* had been different. Assume that Washington and Arizona, by legislative enactments and judicial decisions, had always recognized riparian rights in general, and accretion rights in particular. Then, assume that the Supreme Courts of thos tates simply ignored their earlier decisions and declared that no feature of riparian rights were or ever had been recognized in such States, thus divesting Mrs. Hughes and the Bonelli Cattle Company of accretion rights that they clearly would have owned under the prior state law.

Under these assumed facts, would this Court have permitted such a taking of private property rights without just compensation in violation of the Fourteenth Amendment to the United States Constitution? Surely it would not!

But why would such *hypothetical* conduct on the part of the Washington and Arizona Supreme Courts be any different than the *actual* effect of this Court's decisions in *Hughes* and *Bonelli*? There would be no difference.

This Court can, of course, dispose of the present case by deciding merely that federal law cannot be applied to resolve disputes to lands located below the or-

dinary high mark or the line of average high tides. With that rationale, it would be easy to distinguish *Hughes* and *Bonelli*, since they dealt only with lands that were determined to be, under federal decisional law, located above such boundaries. But it is respectfully submitted that such a course of action would be too cautious, and would leave intact the very uncertainty, confusion and doubt that has spawned the present litigation. More than half of the States of the Union are now before the Court in this action, urging the Court to return to its earlier precedents under which local rules of property law governed all local property disputes. If this Court were to act now to overrule *Hughes* and *Bonelli*, such action would be much more modest than that earlier taken by this Court in *Erie* to overrule the entire *Swift* doctrine, because there the Court could have simply held that there was to be no federal common law of torts, without revoking the federal common law governing commercial transactions as developed under the *Swift* doctrine. And the benefits to be realized from the action now proposed would seem to be much greater than those derived from *Erie*.

Hughes and *Bonelli* are bad law for many reasons. Eighteen of those reasons are summarized in Section II of this brief, *supra*, and need not be restated in this Conclusion. Utah and New Mexico respectfully request the Court to overrule *Hughes* and *Bonelli* and to declare, as it did in 1894 (and at all times prior to 1967), that:

> . . . upon the principles recognized and affirmed by a uniform series of recent decisions of this

court . . . the law of Oregon governs the case. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

Respectfully submitted.

Toney Anaya
Attorney General of
New Mexico

Paul L. Bloom
Assistant Attorney
General of New Mexico

Department of Justice
Supreme Court
Building
Santa Fe, New Mexico
87503

Vernon B. Romney
Attorney General of
Utah
In behalf of Utah and
New Mexico as *Amici*
Curiae

Robert B. Hansen
Deputy Attorney
General of Utah

Dallin W. Jensen
Assistant Attorney
General of Utah

Richard L. Dewsnup
Special Asst. Attorney
General of Utah

236 State Capitol
Building
Salt Lake City, Utah
84114

CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and Counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing *amici curiae* brief of the State of Utah and the State of New Mexico were served on all parties and on *amici curiae* in this case by mailing the same, air mail postage prepaid, to their attorneys of record as set forth below, this 7th day of April, 1976, all in accordance with the Rules of this Court.

STATE OF OREGON, Petitioner and Respondent
Lee Johnson, Attorney General of Oregon
c/o Peter S. Herman
Senior Counsel
100 State Office Building
Salem, Oregon 97330

CORVALLIS SAND & GRAVEL COMPANY,
Petitioner and Respondent
Robert Mix, Esquire
745 N.W. VanBuren
Corvallis, Oregon 97330

STATE OF CALIFORNIA, *et al.*, *Amici Curiae*
Evelle J. Younger, Attorney General of California
c/o Jerold A. Krieger
Deputy Attorney General
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010

VERNON B. ROMNEY

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 8 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-567 and 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner and Respondent

Versus

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent and Petitioner

ON WRIT OF CERTIORARI to the Supreme Court of the State of Oregon

---

BRIEF FOR AMICI CURIAE

K.J. GILLY
JOHN T. NESSER III
1100 Whitney Building
New Orleans, Louisiana 70130
JACK C. CALDWELL
519 Main Street
Franklin, Louisiana 70538
GUY L. NEVILL
P.O. Box 22468
Houston, Texas
Attorneys at Law

SUBJECT INDEX

PAGE

AUTHORITIES INDEX..... (ii)

INTEREST OF AMICI CURIAE..... 1,2,3

ARGUMENT..... 4-6

I. CALIFORNIA, ET AL, IN THEIR..... 4-6
ROLES AS AMICI CURIAE, SHOULD
NOT BE ALLOWED TO CHANGE THE
ISSUES FRAMED BY THE LITIGANTS

II. BONELLI DOES NOT SUGGEST THAT..... 7,8
THE WATER BOTTOM TITLES OF THE
ORIGINAL THIRTEEN STATES ARE
GREATER THAN OR LESS THAN, OR
VARY IN ANY WAY FROM, THE WATER
BOTTOM TITLES OF THE LATER
THIRTY-SEVEN STATES

III. THE CONVEYANCE OF NAVIGABLE..... 9-11
WATER BOTTOMS BY THE UNITED
STATES TO A STATE IS A "GRANT"
WHICH MUST BE CONSTRUED IN
ACCORDANCE WITH THE LAWS OF THE
UNITED STATES.

IV. THE FEDERAL COMMON LAW..... 11-16
RELATING TO WATER BOTTOMS AND
EMERGED LANDS WAS NOT CREATED
BY BONELLI, BUT RATHER HAS
ANCIENT ORIGINS IN THE
JURISPRUDENCE OF THIS COURT

CONCLUSION..... 17

CERTIFICATE..... 18

TABLE OF CASES PAGE

Banks v. Ogden, 2 Wall. 57 (1865)..... 12
Barney v. Keokuk, 94 U.S. 324 (1876)..... 11,12
Brewer-Elliot Oil and Gas Co. v. United States,..... 10
270 F.100 (8th Cir. 1920)
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)..... 10
County of St. Clair v. Lovingston, 23 Wall. 46.....12,
(1874) 13,14,15
Hughes v. Washington, 389 U.S. 290 (1967)..... 15,16
Iowa v. Rood, 187 U.S. 87 (1902)..... 5,6
Jones, et al v. Johnson, 18 How. 150 (1856).....12
Knetsch v. United States, 364 U.s. 361 (1960).....5
Organized Village of Kake v. Eagan, 174.....9
F.Supp. 500 (D.C. Alaska, 1959)
Prosser v. Northern Pacific Railway Company,.....10
152 U.S. 59 (1894)
St. Louis v. Rutz, 138 U.S. 226 (1891)..... 11
Shively v. Bowlby, 152 U.S. 1 (1894)..... 10
State of Arizona v. Bonelli, 414 U.S. 313 (1973)..... 2, 3,
4,6,7,9,11,15,16,17
State v. Bozeman, 156 La. 635, 101 So. 4 (1924) 10
State v. Capdeville, 146 La. 94, 83 So. 421..... 10
(1919)
United States v. F.M. Jabara & Bros.,.....5
19 C.C.P.A. 76, cert. denied, 284 U.S. 623 (1931)
United States v. Holt State Bank, 270 U.S. 49.....10
(1945)
United States v. Oregon, 295 U.S. 1 (1934).....6,9,11
United States v. Texas, 339 U.S. 707 (1949).....8
United States v. Utah, 283 U.S. 64 (1930).....6,9,11
United States v. Washington, 294 F.2d 830.....9
(9th Cir., 1961)
United States v. Winans, 198 U.S. 371 (1905).....10
Utah v. United States, 403 U.S. 9 (1971).....6

TEXTBOOK

Corpus Juris Secundum, Verbo *Amicus Curiae,*.....5
Vol. 3A, Sec. 7, page 430

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-567 and 75-577
(Consolidated)

STATE OF OREGON, Acting by and through
the State Land Board,

Petitioner and Respondent

Versus

CORVALLIS SAND AND GRAVEL COMPANY, an
Oregon corporation,

Respondent and Petitioner

ON WRIT OF CERTIORARI to the Supreme Court of the State of Oregon

BRIEF FOR AMICI CURIAE

INTEREST OF AMICI CURIAE

This case involves a title controversy between the State of Oregon and Corvallis Sand and Gravel Company (Corvallis), a riparian landowner, both claiming title to lands presently below the high water mark of the Willamette River. Some of these tracts are between ordinary high water and ordinary low water, and some of the tracts are below the

ordinary low water line. The litigation includes questions as to whether changes in the course of the river have been wrought by erosion or avulsion and as to the effect of the joining, by the process of accretion, of Avery Bar to the riparian uplands, Avery Bar having originated as an island in the bed of the river. The Oregon courts have adhered to the view that the rights of the State (and the conflicting rights of the riparian owner) in and to lands underlying navigable waters and lands emerging therefrom depend upon the construction of the grant of the navigable water bottoms to the State under the equal-footing doctrine, embodied in the admitting statute, and also under the Submerged Lands Act, and therefore are governed by Federal common law. This, of course, is in conformity with the holding of the United States Supreme Court in *State of Arizona v. Bonelli*, 414 U.S. 313 (1973).

Both litigants, Oregon and Corvallis, agree that this case requires the interpretation of the equal-footing doctrine with respect to the nature and extent of the navigable water bottom title granted to the State in the admitting statute. However, California and several other states (California, et al), as amici curiae, argue, contradictorily to both of the actual litigants, that the equal footing doctrine is not involved in the controversy and requires no interpretation herein, that the federal common law is not applicable to the controversy, and that *Bonelli* was in error in holding that the lands (in *Bonelli* the lands had emerged above present high water of the Colorado River through the channelization thereof) were *not* lands "...the title to which is vested in the State as a matter of federal settled law..." and that "...the question of title as between the State and a private landowner necessarily depends on a construction of a 'right asserted under federal law'." 1/ California, et al, would have this Court overrule *Bonelli* and dismiss the writs of certiorari previously granted herein (to both litigants) and

1/ 414 U.S. 320, 321

hold that the requisite federal question, for the purpose of this Court's appellate jurisdiction, does not exist.

The present amici curiae (present amici) represent numerous parties owning lands, in states other than Oregon, fronting on navigable water bodies; large tracts of such lands are located in the Atchafalaya Basin in the State of Louisiana. Present amici are at this time engaged in litigation asserting their said clients' respective titles to accretions to their riparian lands, and to a substantial degree present amici depend upon the equal footing doctrine, as interpreted in *Bonelli*, and upon the federal common law, as reiterated in *Bonelli*, for the protection of the titles of their said clients. It is important to present amici that this Court, in the instant proceedings, adhere to the principles of *Bonelli* and deny the request of California, et al to "return this case to the Oregon Supreme Court relieved of that precedent (*Bonelli*) for a new decision ..." 2/

2/ Brief of California, et al, p. 33.

ARGUMENT

I.

CALIFORNIA, ET AL, IN THEIR ROLES AS AMICI CURIAE, SHOULD NOT BE ALLOWED TO CHANGE THE ISSUES FRAMED BY THE LITIGANTS

Oregon here takes the position affirmatively that the equal footing doctrine is "involved" and requires interpretation in the instant case. [3/] Oregon would have such doctrine interpreted as allowing the State's ownership of its navigable water bottoms to follow the river in all of its course changes, independent of the character of the changes in the river as sudden or imperceptible. [4/] This is the only change requested by Oregon in the principles announced in *Bonelli*, and particularly Oregon does not quarrel with the Bonelli holding that the emerged lands are owned by the riparian owner;[5/] further, Oregon would have the court limit avulsions "...to the rare and cataclysmic events that they are supposed to be."[6/]

Corvallis also recognizes that the equal footing doctrine and its interpretation form the core of the instant case.[7/] Corvallis would have this court hold that the grant of navigable water bottoms to the states pursuant to the equal footing doctrine was limited to tidal waters and did not include fresh water streams, such as the Willamette River, and that, in any event, such grant included only water bottoms as they existed (i.e., covered by water) on the date of the admission of the State into the Union, including such additions to the bed as may be caused gradually and

3/ See pages 2 and 3 of Oregon's brief in No. 75-567 and p. 2 of Oregon's brief in No. 75-577.

4/ See p. 18 of Oregon's brief in No. 75-567.

5/ See Footnote 6, p. 19 of Oregon's brief in No. 75-567.

6/ See p. 27 of Oregon's brief in No. 75-567.

7/ See pp. 26 and 27 of Corvallis' brief in No. 75-577.

imperceptibly by erosion, but affirmatively excluding the bottom of any channel or stream-diversion caused after the inception of statehood through the process of avulsion.

Although the above review of the issues, as they were framed by the litigants themselves, with respect to the equal footing doctrine, may be too restrictive, we respectfully submit that they present in fair capsule form the legal questions which are the nub of this lawsuit. The evidence adduced and arguments presented to the State courts, as well as the written reasons for judgment handed down by State courts, address themselves to these issues. And now California, et al as amici curiae, attempt to change these issues and to assure this Court that the equal footing doctrine is not involved here and that the litigants, both of which have petitioned for and been granted writs of certiorari, have not established a basis for the jurisdiction of this Court. [8/] We respectfully submit that California, et al should not be allowed to change in any manner, and particularly not in the radical manner attempted here, the issues framed by the parties and litigated in the state courts. *Corpus Juris Secundum*, Verbo AMICUS CURIAE, Vol. 3A, Sec. 7, page 430, in referring to the role of the amicus, states:

> "He must take the case as he finds it, with the issues made by the parties."

See also *United States v. F. M. Jabara & Bros.*, 19 C.C.P.A. 76, cert. denied, 284 U.S. 623 (1931). In *Knetsch v. United States*, 364 U.S. 361, 370 (1960), this Court refused to consider an argument made by an amicus but not theretofore advanced by the litigants.

We respectfully submit that California, et al should not be allowed to assume control of this case and to change radically the issues framed by the litigants and purportedly resolved by the state courts.

8/ California, et al cite **Iowa v. Rood,** 187 U.S. 87 (1902) as authority for the

proposition that the assertion by the State of title to water bottoms under the admitting statute did not present a federal question for the purpose of establishing the jurisdiction of this Court. In that case Iowa had intervened in a lawsuit between private claimants in which the plaintiff asserted title under the remote origin of the Act of Congress of September 28, 1850, the so called "swamp-land grant" to Iowa, the plaintiff having proved a conveyance to the State under said Act and a chain of title from the State into himself. The defendant claimed under the homestead and preemption laws, and in so doing asserted that the lands were not in fact swamp and overlfowed on September 28, 1850. The plaintiff prevailed in State Court, and Iowa (intervenor) requested this Court to accept jurisdiction because of its claim of title to a purportedly navigable water bottom under the admitting statute. In dismissing the writ of error, this Court noted that Iowa's Attorney General had originally claimed on the merits that the State's title did **not** depend upon any Act of Congress or any grant from the United States, and then attempted to assert title under such grant for the purpose of establishing the jurisdiction of the U.S. Supreme Court, this Court noting that Iowa was attempting "to blow hot and cold upon the same question" (187 U.S. at p. 92). The Court also indicated that the assertion of a claim under the Act of Congress is not sufficient to establish this Court's appellate jurisdiction "unless there be at least a plausible soundess for such claim." We surmise from the decision that this Court thought very little of Iowa's claim on the merits, perhaps due to the fact that the plaintiffs' chain of title included a conveyance by the State, or perhaps due to the fact that its Attorney Genral had argued both that the State **did** and then **did not** claim under a statute of the United States, or perhaps because the controversy was decided by the Supreme Court of Iowa without referring to the admitting statute (or to the treaty provisions or constitutional provisions also purportedly relied upon by Iowa). If these explanations as to the true basis for the decision are not persuasive, and we submit respectfully that they are, then we must regard any suggestion in **Iowa** that a claim of title **directly** under an Act of Congress (and requiring its interpretation) does not present a federal question, to be in conflict with other clear, and later, expressions of this Court, including those in **United States v. Utah,** 283 U.S. 64, 75 (1930), **United States v. Oregon,** 295 U.S. 1, 14 (1934), and **Utah v. United States,** 403 U.S. 9, 10 (1971), and of course in **Bonelli** itself.

II.

BONELLI DOES NOT SUGGEST THAT THE WATER BOTTOM TITLES OF THE ORIGINAL THIRTEEN STATES ARE GREATER THAN OR LESS THAN, OR VARY IN ANY WAY FROM, THE WATER BOTTOM TITLES OF THE LATER THIRTY-SEVEN STATES

California, et al suggest [9/] that *Bonelli* purports to establish a water bottom title in the later thirty-seven states which is inferior in some way to the water bottom title of the original thirteen. Absolutely nothing in the majority decision in *Bonelli* suggests this result. California, et al in advancing this principle, purport to rely on the dissenting opinion of Mr. Justice Stewart in *Bonelli.* The dissenting Justice suggests that the original thirteen are "free to develop and apply their own rules of property law" to lands emerged above the waters of a river, while the later thirty-seven must "knuckle under" to the federal common law, but we respectfully submit that this appears to be a statement of what the dissenting Justice fears might be the result if the principles of *Bonelli* are allowed to run rampant beyond what we respectfully submit are their obvious limitations.

Nothing in the majority decision in *Bonelli* suggests that there exists one set of rules for determining the ownership of water bottoms or emerged lands in the original thirteen and another set of rules for the later thirty-seven; nor can there be so much as one variation in the rules of ownership applicable to the respective states. There can be no difference in result in a title controversy as to water bottoms or emerged lands, regardless of the state in which the

9/ See Footnote 2, page 4, of brief of California, et al.

controversy exists. The equal footing doctrine can mean nothing more than, and nothing less than, that the water bottom title received by a new state reaches as far as, but no further than, the water bottom title reserved by the original thirteen, and is subject to the same restrictions and limitations, including conditions of defeasance, as the reserved title of the original thirteen. [10/] The only difference would be not in the result or the resolution of the controversy, but only that in the original thirteen the federal question therein presented would arise under the United States Constitution, whereas the same controversy in one of the later thirty-seven would arise under the admitting statute. And this distinction, which is wholly unimportant to the resolution of the merits of a title controversy, is due to the fact that the original thirteen "reserved" their water bottom titles in ratifying the Constitution, whereas the later thirty-seven were "granted" their titles by virtue of the equal footing doctrine expressly included in the admitting statutes.

10/ See discussion in **United States v. Texas,** 339 U.S. 707, 716, 717 (1949), including the clear statement that the equal footing clause has a **direct effect** on certain property rights, not merely political and sovereignty matters, contrary to the argument of California, et al (Brief of California, et al, pp. 14-18).

III.

THE CONVEYANCE OF NAVIGABLE WATER BOTTOMS BY THE UNITED STATES TO A STATE IS A "GRANT" WHICH MUST BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE UNITED STATES

California, et al apparently deny that the conveyance of navigable water bottoms is a "grant" which must be construed in accordance with federal law. [11/] They correctly point out, however, that *Bonelli* [12/] does refer to the states' acquisition of water bottoms as "the original *grant* to the States" (emphasis supplied). Earlier in the same opinion, [13/] this Court discussed the passing of title to the states as follows:

> "Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the equal-footing doctrine. See, e.g., Pollard's Lessee v. Hagan, 3 How 212, 11 L.Ed. 565 (1845); Shively v. Bowlby, 152 US 1, 38 L.Ed. 331, 14 S Ct 548 (1894); Weber v. Board of Harbor Comm'rs., 18 Wall 57, 65-66, 21 L.Ed. 798 (1873)."

The Federal courts have uniformly recognized the states' title to water bottoms as having "passed" to the states from the United States upon the entry of each new state into the union; see *United States v. Oregon,* 295 U.S. 1, 14 (1934); *United States v. Utah,* 283 U.S. 64, 75 (1930); *United States v. Washington,* 9th Cir., 294 F. 2d 830, 834 (1961); and *Organized Village of Kake v. Eagan,* D.C. Alaska, 174 F. Supp. 500, 503 (1959). Certainly, during the pre-statehood period, title to the water bottoms must have vested in some entity, and of course that entity could only have been the

11/ Brief of California, et al, p. 19
12/ 414 U.S. 323
13/ 414 U.S. 318

United States, despite some decisions by state courts to the effect that the United States "never had any title to" these navigable water botoms. [14/]

But California, et al apparently admit that the water bottoms "passed" from the United States to each new state, but somehow, by strained reasoning, have convinced themselves that this "passing" of title is not a "grant" or "granting" of title. And they do so, not because they are led to that conclusion by logic, but rather because they imagine that, if they reach that conclusion, the "transfer" of title need not be governed by federal law.

Shively v. Bowlby, 152 U.S. 1 (1894) and *United States v. Holt State Bank,* 270 U.S. 49 (1945) hold squarely that during the pre-statehood period the United States had the authority, occasionally exercised, to convey navigable waterbottoms to third parties, that is, parties other than the state not yet formed; see also *United States v. Winans,* 198 U.S. 371 (1905); *Prosser v. Northern Pacific Railway Company,* 152 U.S. 59 (1894), and *Brewer-Elliott Oil and Gas Co. v. United States,* 8th Cir., 270 F. 100, 108 (1920). Further, *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970) upheld a conveyance by the United States to the Choctaw and Cherokee Nations of a part of the bed of a navigable river within the borders of the subsequently formed State of Oklahoma.

We fail to see any reason, and California, et al have offered none, as to why the acquisition by a sovereign state of title to water bottoms at the inception of such state's existence, is anything other than a "grant" of such navigable water bottoms by the national sovereign, well within the rule that grants of land by the national sovereign must be construed and governed by national law. And this designation as a "grant" is underscored by the fact that the

14/ **State v. Bozeman,** 156 La. 635, 101 So. 4, 6 (1924); **State v. Capdeville,** 146 La. 94, 83 So. 421, 425 (1919).

national sovereign admittedly had the right to convey such water bottoms to other parties during the pre-statehood period. Certainly matters of interpretation with respect to these "grants" (or "transfers" as California, et al would so delicately designate them) should not be left to the varying interpretations of fifty separate judicial systems; see *United States v. Oregon,* supra, and *United States v. Utah,* supra.

IV.

THE FEDERAL COMMON LAW RELATING TO WATER BOTTOMS AND EMERGED LANDS WAS NOT CREATED BY BONELLI, BUT RATHER HAS ANCIENT ORIGINS IN THE JURISPRUDENCE OF THIS COURT

California, et al suggest in their brief that the principles of the federal common law, with respect to water bottoms and lands which emerge from navigable waters, are matters of recent origin, that only *Bonelli* announces these principles, and that *Bonelli* itself should be treated as a solitary intrusion into an area of the law long avoided by this Court. [15/] Nothing could be more inaccurate. *Bonelli*

15/ In an effort to show that this Court has recognized the principle that title to land acquired by accretion was acquired under the law of the State, not the United States, California, et al have cited **St. Louis v. Rutz,** 138 U.S. 226 (1891) and **Barney v. Keokuk,** 94 U.S. 324 (1876). In **St. Louis,** the City of St. Louis, as the owner of an island (located in the State of Missouri) in the Mississippi River, was attempting to establish title to accretion (located in Illinois) as against another private landowner who, under the law of Illinois, owned that part of the bed of the Mississippi River on which the accretion was located. There was no attempt by a sovereign state to prevent emerged lands from passing into private ownership.

Actually, the decision in **Barney,** 94 U.S. at p. 337, contains the following language:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and

did not create the federal common law with respect to the matters adjudged therein; it merely reiterated principles upon which this Court has relied at least as far back as 1856. In *Jones, et al v. Johnson.* 18 How. 150, 156 (1856), this Court announced the following principle:

> "Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining. 2 Bl. Com. 261, 262."

In *Banks v. Ogden,* 2 Wall. 57, 67 (1865), the Federal rule was stated as follows:

> "The rule governing additions made to land bounded by a river, lake or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded, is entitled to these additions."

Similarly, in *County of St. Clair v. Lovingston,* 23 Wall. 46, 68, 69 (1874), this Court stated as follows:

> *"Blackstone thus lays down the rule of the common law:*
>
> 'And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in

---

imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself",

suggesting that again in this instance this Court would require that accretions vest in the riparian owner if same be formed gradually and imperceptibly and by natural causes, and would allow State law to determine the ownership **only** of accretions formed by artificial means or by "unusual floods". This is precisely the opposite of the proposition for which the case is cited by California, et al.

> time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the King; for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.' 2 Com., 262; see, also, Woolrych, L. Waters, 34; and Shultes, Aquatic Rights, 116.

Blackstone takes his definition from Bracton, lib. 2, ch. 2. Bracton was a judge in the reign of Henry III., and the greatest authority of his time. Hale, in his De Jure Maris, says Bracton followed the civil law. Hale himself shows the great antiquity of the rule in the English law. De Jure Maris, 1st pt. ch. 6; see, also, King v. Yarborough, 1 Dow. & C. App. Cas. 178.

Chancellor Kent, the American commentator, recognizes the rule as it is laid down by the English authorities referred to. 3 Kent, Com., 428.

By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. Martin v. Waddell, 16 Pet. 367; Russell v. Jersey Co. 15 How., 426. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones. Pollard v. Hagan, 3 How. 212;

Goodtitle v. Kibbe, 9 How. 471; Hallett v. Beebe, 13 How. 25; Withers v. Buckley, 20 How. 84; 15 L. ed. 816.

The question here under consideration is not a new one in this court. In New Orleans v. U.S. 10 Pet. 662, it was said: 'The question is well settled *at common law* that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain.'

To the same effect are Saulet v. Shepherd, 4 Wall. 502, 18 L. ed. 442, and Schools v. Risley, 10 Wall., 110, 19 L. ed., 856.

In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one.* The maxim 'Qui sentit onus debet sentire commodum'

lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where dikes and other defenses are, and where they are not necessary to keep the water within its proper limits. 3 Wash. R. Prop. 48; Munic. No. 2 v. Orleans Cotton Press, 18 La. 122.'' (Emphasis Supplied) [14/]

And in *Hughes v. Washington,* 389 U.S. 290 (1967), the Supreme Court in applying the rule to accretion formed by the Pacific Ocean stated as follows:

''This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives its title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a navigable water acquires a right to any natural and gradual accretion formed along the shore. In Jones v. Johnston, 18 How. 150, 15 L. ed. 320 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that '(l)and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining.' 18 How, at 156, 15 L ed at 323. The Court has repeatedly reaffirmed this

14/ The recognition of the vested right of a riparian owner to future alluvion is most interesting. Of course, the riparian owner cannot be deprived of a vested property right without due process and just compensation. This in itself is a sufficient basis for the continuing applicability of the principles of the federal common law. The ''vested right'' to future alluvion is also expressly recognized in **Bonelli,** 414 U.S. at p. 326.

rule, County of St. Clair v. Lovingston, 23 Wall. 46, 23 L ed 59 (1874); Jefferis v. East Omaha Land Co., 134 US 178, 33 L ed 872, 10 S Ct 518 (1890), and the soundness of the principle is scarecely open to question.''

Therefore, this Court's statement of the federal common law in *Bonelli,* 414 U.S. at p. 325, was not a departure from the earlier decisions of this Court, nor was it a new pronouncement of law, but merely an adherence to time honored principles, as follows:

> ''Federal law recognizes the doctrine of accretion whereby the 'grantee of land bounded by a body of navigable water acquires a right to any ... gradual accretion formed along the shore.' Hughes v. Washington, 389 US 290, 293, 19 L Ed 2d 530, 88 S Ct 438 (1967); accord, Jones v. Johnston, 18 How 150, 156, 15 L Ed 320 (1856). When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land.''

The argument of California, et al that there is no reason for, or that there should not be, a Federal common law in this area, fails to touch the point. The plain fact is that there *is*, and has been for more than a century, a Federal common law with respect to the titles of navigable water bottoms granted to the states and the lands which emerge therefrom. California, et al, although purportedly requesting only the reconsideration of *Bonelli,* actually ask for the overruling of more than a century of jurisprudence of this Court; the request should be denied.

CONCLUSION

Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973) correctly construed the equal footing doctrine and the Federal common law as being determinative of the rights of a sovereign state vis a vis a riparian landowner, with respect to navigable water bottoms and the lands which emerge above present high water. Clearly a federal question, for purposes of the appellate jurisdiction of this honorable Court, did exist in *Bonelli,* and the writ of certiorari was properly granted therein. Similarly, the instant case presents a federal question inasmuch as it requires the interpretation of the equal footing doctrine in accordance with the issues as framed by the actual litigants herein and purportedly resolved by the State courts. Accordingly, we respectfully urge this Court to refrain from any departure from the principles of law set forth in *Bonelli* and to maintain its jurisdiction over the instant proceedings.

Respectfully submitted,

K. J. Gilly
John T. Nesser III
1100 Whitney Building
New Orleans, Louisiana 70130

Jack C. Caldwell
519 Main Street
Franklin, Louisiana 70538

Guy L. Nevill
P. O. Box 22468
Houston, Texas

Attorneys at Law

CERTIFICATE

I hereby certify that three copies of the foregoing Brief of Amici Curiae have been served on each party separately represented in these proceedings, to wit: The State of Oregon, by mailing same to its counsel of record, Peter S. Herman, Esq., at his address, 100 State Office Building, Salem, Oregon 97310, and Corvallis Sand and Gravel Company, by mailing same to its counsel of record, Robert Mix, Esq., at his address 745 NW Van Buren, Corvallis, Oregon 97330, each such service having been made by depositing same in a U.S. Mail Box, with first class postage prepaid, addressed as aforesaid.

September 7, 1976.



see

75

577